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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

MERCHANTS BANK OF CALIFORNIA, N.A.,
Petitioner,
VS.
JOHN MARDULA, JR.,
Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Second District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the National Bank Act, 12 U.S.C. § 24 (Fifth), preempt a bank President's contractual cause of action seeking to enforce a severance pay provision in his written employment contract where the bank officer was discharged by the Bank's Board of Directors?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below are Plaintiff JOHN MARDULA, Jr., the former President of the Bank, and RANCHO DOMINGUEZ BANK, N.A., the name of which has since been changed to MERCHANTS BANK OF CALIFORNIA, N.A. The bank has no subsidiaries. Daniel K. Roberts of the law firm of Roberts & Roberts is the principal owner of the bank.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR ALLOWANCE OF THE WRIT	4
THE HOLDING OF THE COURT OF APPEAL DEVIATES FROM A LONG LINE OF CALIFORNIA CASES	5
THE CODE OF FEDERAL REGULATIONS DOES NOT REPEAL 12 U.S.C. § 24 BY IMPLICATION	10
THE CORRECT STATUTORY CONSTRUCTION OF 12 U.S.C. § 24(5) PREEMPTS STATE LAW CONTRACTUAL CLAIMS FOR RELIEF	12
PRIOR PRECEDENTS FULLY SUPPORT THE "WELLS FARGO" DECISION IN DETERMINING THAT STATE LAW CAUSES OF ACTION ARE PREEMPTED BY 12 U.S.C. § 24(5)	14
PUBLIC POLICY SUPPORTS PREEMPTION	17
CONCLUSION	18
APPENDIX	A-1

TABLE OF AUTHORITIES

Federal Cases

Page

Douglas v. State of California, 372 U.S. 353,354 n.1, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) 2

Gotthilf v. Sills, 375 U.S. 79,79-80, 84 S.Ct. 187, 11 L.Ed.2d 159 (1963) 2

Greenwood v. United States, 350 U.S. 366,374, 76 S.Ct. 410,414, 100 L.Ed. 412 (1956) 13

Mackey v. Pioneer National Bank, 867 F.2d 520,525 (9th Cir.1989) 3, 6, 12, 14

Minneapolis, St. Paul, Saux St. Marie Railway Company v. Rock, 279 U.S. 410,412, 49 S.Ct. 363, 73 L.Ed. 766 (1929) 2

Prudential Ins. Co. v. Cheek, 259 U.S. 530,533-4, 42 S.Ct. 516, 66 L.Ed. 1044 (1922) 2

Westervelt v. Mohrenstecher, 76 Fed. 118, (8th Cir.1896) 6, 12, 14, 15

California Cases

Aalgaard v. Merchants National Bank, Inc., 224 Cal.App.3d 674,689-690, 274 Cal.Rptr. 81 (3rd Dist.1990), rev.den., cert.den. 502 U.S. 901, 112 S.Ct. 278, 116 L.Ed.2d 230 .....9, 10

California State Restaurant Association v. Whitlow, 58 Cal.App.3d 340,347, 129 Cal.Rptr. 824 (1976) 11

Carmona v. Division of Industrial Safety, 13 Cal.3d 303,310, 118 Cal.Rptr. 473 (1975) 11

Cox v. First National Bank, 10 Cal.App.2d 302,305, 52 P.2d 524 (4th Dist.1935) 7, 8, 9

Johnston v. Dept. of Personnel Administration, 191 Cal.App.3d 1218, 236 Cal.Rptr. 853,856 (1987) ... 13

TABLE OF AUTHORITIES

CALIFORNIA CASES

Page

Kozlowsky v. Westminster National Bank, 6 Cal.App.3d 593,597, 86 Cal.Rptr. 52 (2nd Dist,1970) 8

Mardula v. Rancho Dominguez Bank, N.A., 43 Cal.App.4th 790, 51 Cal.Rptr.2d 63 (1996) ..1, 2, 4, 11

Mills v. Superior Court, 42 Cal.3d 951,957, 232 Cal.Rptr. 141, 728 P.2d 211 (1986) 13

Morris v. Williams, 67 Cal.2d 733,737, 63 Cal.Rptr. 689 (1967) 11

Nadler v. California Veterans Board, 152 Cal.App.3d 707, 199 Cal.Rptr. 546 (1984) 11

Ontario Community Foundation v. State Bd. of Equalization, 35 Cal.3d 811, 201 Cal.Rptr. 165,168 (1984) 11, 12

Pacific Legal Foundation v. Unemployment Ins. Appeals Bd., 29 Cal.3d 101,117, 172 Cal.Rptr. 194 (1981) 12

Perdue v. Crocker National Bank, 38 Cal.3d 913,935-6 (1985) 11

Powell v. California Dept. of Employment, 63 C.2d 103,106, 45 Cal.Rptr. 136 (1965) 8

Ralphs Grocery v. Reimel, 69 Cal.2d 172,176, fn.3, 70 Cal.Rptr. 407 (1968) 11

Skyline Homes, Inc. v. Occupational Safety & Health Appeals Bd., 120 Cal.App.3d 663,669, 174 Cal.Rptr. 665 (1981) 11

Stockton Theatres, Inc. v. Palermo, 47 Cal.2d 469,476, 304 P.2d 7 (1956) 13

Wells Fargo Bank v. Superior Court, 53 Cal.3d 1082, 282 Cal.Rptr. 841 (1991) 3, 5, 6, 7, 12, 14

TABLE OF AUTHORITIES

Sister State Cases

Page

Copeland v. Melrose Nat. Bank, 229 A.D. 311, 241 N.Y.S. 429 (1930) 16

Ewert v. Drexel National Bank, 271 Ill.App.3d 1124, 208 Ill.Dec. 431, 649 N.E.2d 487 (Ill.App.1995) .. 4

First National Bank of Danville v. Reynolds, 491 N.E.2d 218 (Ind.App.1986) 4

International Bank of Miami v. Bennett, 513 So.2d 1294 (Fla.App. 3 Dist. 1987), cert.denied, 485 U.S. 988 (1988) 15

Kemper v. First Natl. Bank in Newton, 94 Ill.App.3d 169, 418 N.E.2d 819,821 (1981) 13

Rhode v. First Deposit National Bank, 127 N.H. 107, 497 A.2d 1214 (1985) 16

Statutes and Regulations

California

Code of Civil Procedure § 581(f)(1) 3

Federal

12 U.S.C. § 24(5) 2, 3, 5, 7, 10, 11, 12, 14

12 C.F.R. 7.5220 .....10, 11

Secondary Sources

111 A.L.R. 894 (1937) 13

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OPINIONS BELOW

The California Court of Appeal, Second District, Division Three, issued its opinion in this case on March 15, 1996. The citation for this case is *Mardula v. Rancho Dominguez Bank, N.A.*, 43 Cal.App.4th 790, 51 Cal.Rptr.2d 63 (1996).

In pertinent part, the decision of the Court of Appeal provides as follows:

"The appeal presents a question not yet decided by a California or a federal court: whether section 24 of the National Bank Act, which provides that all officers of a national bank serve at the pleasure of its board of directors, precludes enforcement of a bank's written agreement that its president will receive severance pay if discharged without

cause. We hold that the severance pay agreement is enforceable." *Mardula v. Rancho Dominguez Bank*, 43 Cal.App.4th at 792, 51 Cal.Rptr.2d at 63.

On July 17, 1996, the California Supreme Court denied RANCHO DOMINGUEZ BANK, N.A.'s Petition for Review.

JURISDICTION

Whenever the highest court of a state, by any form of decision, affirms or denies the validity of a judgment of an inferior court over which it by law can exercise appellate authority, the jurisdiction of the United States Supreme Court to review that decision, if it involves a federal question, will, on a proper proceeding attach. *Minneapolis, St. Paul, Saux St. Marie Railway Company v. Rock*, 279 U.S. 410, 412, 49 S.Ct. 363, 73 L.Ed. 766 (1929), *Gotthilf v. Sills*, 375 U.S. 79,79-80, 84 S.Ct. 187, 11 L.Ed.2d 159 (1963) and *Prudential Ins. Co. v. Cheek*, 259 U.S. 530,533-4, 42 S.Ct. 516, 66 L.Ed. 1044 (1922). Therefore, the denial of review by the California Supreme Court exhausts the California remedies and the case may be properly reviewed by the United States Supreme Court. *Douglas v. State of California*, 372 U.S. 353,354 n.1, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (certiorari).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

12 U.S.C. § 24 provides, in pertinent part, that a National Banking Association "shall have the power. . . [¶] Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places."

STATEMENT OF THE CASE

On May 3, 1994, Plaintiff and Appellant JOHN MARDULA filed a civil action in the Superior Court for the County of Los Angeles alleging a cause of action for "Breach of Employment Contract". (C.T., p.1-6).

The Complaint alleged that "At all times herein mentioned, Defendant RANCHO DOMINGUEZ BANK was a national bank authorized and existing under the laws of the State of California and the Federal Government." (C.T., p.1, ¶ 2).

The Complaint alleged that JOHN MARDULA had been terminated by Resolution of the Board of Directors of the Bank. (C.T., p.3-4, ¶ 10). It further alleged that RANCHO DOMINGUEZ BANK, N.A. had "breached the employment contract in that the employment contract calls for a six month severance package." (C.T., p.4, ¶ 11).

On June 8, 1994, Defendant RANCHO DOMINGUEZ BANK, N.A. demurred to the Complaint. (C.T., p.19-34). The demurrer alleged: "The First Cause of Action fails to state facts sufficient to constitute a cause of action against Defendant[ ] RANCHO DOMINGUEZ BANK . . . because it is preempted by 12 U.S.C. § 24." (C.T., p.21, ¶ 1).

A hearing was held on the demurrer on July 7, 1994 in Department 40 of the Los Angeles Superior Court, Central District, before the Honorable David A. Workman, Judge Presiding. The minute order from that hearing stated: "The demurrer is sustained, without leave to amend, on the ground that 12 U.S.C. § 24 preempts the complaint's causes of action. *Wells Fargo Bank v. Superior Court,* 53 Cal.3d 1082,1087,1088 (1991); *Mackey v. Pioneer National Bank,* 867 F.2d 520,525 (9th Cir.1989). . . . On motion of the defendants, the complaint is dismissed. C.C.P. § 581(f)(1)." (C.T., p.90).

On July 14, 1994, Appellant JOHN MARDULA timely filed his Notice of Appeal. (C.T., p.92-4).

On March 15, 1996, Division Three of the Second Appellate District issued its opinion, certified for publication, in this case. In pertinent part, the decision of the California Court of Appeal provided as follows:

"The appeal presents a question not yet decided by a California or a federal court: whether section 24 of the National Bank Act, which provides that all officers of a national bank serve at the pleasure of its board of directors, precludes enforcement of a bank's written agreement that its president will receive severance pay if discharged without cause. We hold that the severance pay agreement is enforceable." *Mardula v. Rancho Dominguez Bank,* 43 Cal.App.4th at 792, 51 Cal.Rptr.2d at 63.

"Respondents contend the contractual provision for severance pay is unenforceable because irreconcilable with the federal statute. We agree with plaintiff, however, that there is no inconsistency between the statute and a contract provision for a reasonable amount of severance pay." *Mardula v. Rancho Dominguez Bank,* 43 Cal.App.4th at 792, 51 Cal.Rptr.2d at 64.

REASONS FOR ALLOWANCE OF THE WRIT

The decision in this case is the third in a string of published state court cases which have permitted bank officers to sue for breach of the severance pay provisions of their contracts after their termination by the Board of Directors. *First National Bank of Danville v. Reynolds,* 491 N.E.2d 218 (Ind.App.1986), *Ewert v. Drexel National Bank,* 271 Ill.App.3d 1124, 208 Ill.Dec. 431, 649 N.E.2d 487 (Ill.App.1995) and *Mardula v. Rancho Dominguez Bank,* N.A., 43 Cal.App.4th 790, 51 Cal.Rptr.2d 63 (1996). These cases contradict a long string of federal and other

state cases which preclude bank officers, discharged by the board of directors, with or without cause, for suing for breach of contract.

These decisions are a new trend in the law which permit a national banking association to be sued by one of its officers for breach of contract where the discharge was ordered by the Board of Directors of the Bank.

Review by this court is necessary to secure uniformity of decision among state and federal courts and to vindicate a National Banking association's right to be free from contractual claims for relief brought by its discharged officers.

THE HOLDING OF THE COURT OF APPEAL DEVIATES FROM A LONG LINE OF CALIFORNIA CASES

In *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1087, 282 Cal.Rptr. 841 (1991), Plaintiffs Wertz, Bothelo and Moore, bank officers, sued Wells Fargo on a number of theories. The Bank moved for summary judgment and summary adjudication. The trial court partially granted, and partially denied, these motions. "As a result of these rulings, Wertz, Bothelo and Moore were left with claims for breach of contract and breach of the implied covenant." (*Wells Fargo* at 53 Cal.3d at 1087). Wells Fargo appealed.

This California Supreme Court stated in its decision:

> "The National Bank Act grants specified corporate powers to each national bank, including the power 'To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.' (12 U.S.C. § 24, Fifth . . . .) It has been established for

> almost a century that section 24 preempts all state law causes of action by a bank officer for a breach of an employment agreement. (*Mackey v. Pioneer National Bank* (9th Cir.1989) 867 F.2d 520,524-526 . . . . ; *Westervelt v. Mohrenstecher* (8th Cir.1896) 76 Fed. 118.) We are aware of no decision to the contrary, and plaintiffs do not dispute the general rule of preemption."

Wells Fargo Bank v. Superior Court, 53 Cal.3d 1082,1087-8, 282 Cal.Rptr. 841 (1991).

Throughout the Opinion, the California Supreme Court ruled that causes of action by Bank officers were preempted.

> "The concurring opinion also argues the National Bank Act does not preempt state wrongful discharge law. To the contrary, as noted above, every case decided in this area has acknowledged the preemptive effect of section 24 on state law causes of action brought by dismissed bank officers. As the Court of Appeals for the Ninth Circuit explained in *Mackey*, supra, in holding that state law tort and contract claims were preempted by section 24: 'Moreover, it would make little sense to allow state tort claims to proceed . . . . The effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer . . . . The intent of the statute was to place the fullest responsibility upon the directors by giving them the right to discharge such officers at pleasure . . . . It is idle to say that the statute merely gives the power to discharge the official, without the right to do so. The grant of power carries with it the untrammeled right to its exercise, free from penalty.' (*Mackey*, supra, 867 F.2d at p.526)."

Wells Fargo Bank v. Superior Court, 53 Cal.3d 1082,1093, 282 Cal.Rptr. 841 (1991).

"A national bank is granted a broad and unique exemption from state wrongful discharge law by section 24." *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1099, 282 Cal.Rptr. 841 (1991).

The central issue in the *Wells Fargo* case was whether bank officers, who were discharged by more senior bank officers, rather than the Board of Directors, had their wrongful discharge claims preempted by 12 U.S.C. § 24.

"We hold that section 24 does not preempt state law causes of action for wrongful discharge by a former national bank officer unless the officer was dismissed by the bank's board of directors itself . . . ." *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1103, 282 Cal.Rptr. 841 (1991).

In that Respondent JOHN MARDULA admits that (1) he was the President of RANCHO DOMINGUEZ BANK, N.A., an office specifically enumerated in the statute, (2) that RANCHO DOMINGUEZ BANK, N.A., is a national banking institution, covered by the Act, and (3) that he was discharged by resolution of the Board of Directors, the factual and legal basis for the ruling of the trial court seems well established.

Three decisions of the California Courts of Appeal in various districts are in accord.

"A contract with the cashier of a national banking association . . . . will not support an action for damages for discharge nor permit recovery of salary accruing after such discharge." *Cox v. First National Bank*, 10 Cal.App.2d 302,305, 52 P.2d 524 (4th Dist.1935). Yet the severance payments permitted by the Court of Appeals' decision in this case permits the recovery of salary accruing after discharge. "[S]everance and dismissal payments are made with respect to a period of time immediately following such

severance of or dismissal from employment." *Powell v. California Dept. of Employment*, 63 Cal.2d 103,106, 45 Cal.Rptr. 136 (1965).

Thirty five years later, this position was reconfirmed. "By virtue of this statute the board may dismiss an officer without liability for breach of the agreement to employ. (*Cox v. First Nat. Bank* (1935) 10 Cal.App.2d 302,305 .... Because of this statute, plaintiff cannot state a cause of action for breach of his contract of employment. The demurrer to the first count was properly sustained." *Kozlowsky v. Westminster National Bank*, 6 Cal.App.3d 593,597, 86 Cal.Rptr. 52 (2nd Dist,1970).

Twenty years still later, this principle was again accepted.

> "[A]t the heart of this inviolable dismissal provision is a linkage with public policy protecting the financial stability and fiscal integrity of banks by making it beyond the powers of bank directors to enter into any contract restricting their ability to respond expeditiously to financial threats posed by bank officers .... In light of this historical purpose, it is not surprising that contractual claims of employment rights have been deemed preempted by section 24 (Fifth) and its twins in analogous federal statutes. This has been true whether the claims have been anchored in express contractual terms, in implied-in-fact covenants, or in covenants implied in law .... Unremarkably, therefore, throughout the years '[t]he case law uniformly [has] interpret[ed] this section and substantially similar provisions which do not allow a national banking association to discharge its officers at will without incurring liability for breach of contract.' (Citation omitted).
>
> "California has long been in accord with this doctrine with respect to express contractual rights of employment. Thus, in *Kozlowsky v. Westminster Nat.*

> *Bank*, supra, 6 Cal.App.3d 593, the president of a national bank sued for breach of his contract of employment. The *Kozlowsky* court held that section 24 (Fifth) overrode any contract to employ such an officer for a fixed term. 'By virtue of this statute the board may dismiss an officer without liability for breach of the agreement to employ.' (*Id.* at pp.596-597.) The same result was reached in *Cox v. First Natl. Bank* (1935) 10 Cal.App.2d 302 [52 P.2d 524]. There the cashier of a national bank brought suit against the bank to recover unpaid salary during vacation periods. On the salary issue, the *Cox* court noted that '[a] contract with the cashier of a national banking association appointing the cashier for a definite period at a fixed salary is void and does not prevent his removal at any time by the board of directors. It will not support an action for damages for discharge nor permit recovery of salary accruing after such discharge.' (*Id.* at p.305)."

Aalgaard v. Merchants National Bank, Inc., 224 Cal.App.3d 674,689-690, 274 Cal.Rptr. 81 (3rd Dist.1990), rev.den., cert.den. 502 U.S. 901, 112 S.Ct. 278, 116 L.Ed.2d 230.

> "This long line of cases supports the proposition that employment rights of officers of national banking associations which conflict with the right of the board of directors to dismiss them at pleasure are preempted by section 24 (Fifth) whether those rights arise by virtue of an agreement or are imposed by state law, and whether framed as contractual or tortious causes of action. As these cases illustrate, the essential Congressional purpose reflected in the 'at pleasure' provision of section 24 (Fifth) was to confer upon the Board of Directors sweeping powers of dismissal in order to insure the fiscal integrity of national banks and to instill public confidence in those financial institutions. State-based employment rights which inhibit or reduce the

> power of the board to dismiss its officers 'at pleasure' thus conflict with section 24 (Fifth) and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Since these state-based claims would frustrate the full effectiveness of federal law by diminishing the full power of the board to dismiss its officers for the benefit of national banks, they must fall under the supremacy clause."

Aalgaard v. Merchants National Bank, Inc., 224 Cal.App.3d 674,692, 274 Cal.Rptr. 81 (3rd Dist.1990), rev.den., cert.den. 502 U.S. 901, 112 S.Ct. 278, 116 L.Ed.2d 230.

The Court of Appeals opinion asserts that its decision addresses an issue "not yet decided by a California or federal court" (43 Cal.App.4th at 792, 51 Cal.Rptr.2d at 63). But this is only true if the decisions preempting contractual causes of action are thought not to apply to a "severance pay" clause in such a contract. Even though all potential clauses of an employment contract have not been addressed in published opinions, RANCHO DOMINGUEZ BANK N.A. asserts that the decisions preempting contractual causes of action include any conceivable clauses in such a contract. This is not a new issue; it is a well resolved issue.

THE CODE OF FEDERAL REGULATIONS DOES NOT REPEAL 12 U.S.C. § 24 BY IMPLICATION

The Court of Appeals', decision relies upon a 1971 C.F.R. regulation which it contends authorizes this suit.

"An interpretive ruling by the U.S. Comptroller of the Currency, codified in the Code of Federal Regulations, provides that the board of directors of a national bank 'may enter into employment contracts with its officers and employees upon reasonable terms and conditions.' (12 C.F.R.

§ 7.5220)." *Mardula v. Rancho Dominguez Bank*, 43 Cal.App.4th at 795, 51 Cal.Rptr.2d at 66.

12 CFR § 7.5220 actually provides that "The board of directors of a national bank, pursuant to paragraph Fifth of 12 U.S.C. 24, may enter into employment contracts with its officers and employees upon reasonable terms and conditions." Note that the actual regulation specifically mentions the statute creating the preemption.

Respondent argued below that this administrative regulation "interpreted" the statute so as to allow a state law contractual claim to enforce a "golden parachute" or "severance pay" provision in the contract.

However, "it is axiomatic that an administrative agency may not modify, alter or enlarge the provisions of a legislative act being administered." *Nadler v. California Veterans Board*, 152 Cal.App.3d 707, 199 Cal.Rptr. 546 (1984) citing *Ralphs Grocery v. Reimel*, 69 Cal.2d 172,176, fn.3, 70 Cal.Rptr. 407 (1968) and *California State Restaurant Association v. Whitlow*, 58 Cal.App.3d 340,347, 129 Cal.Rptr. 824 (1976). "Correspondingly, there is no agency discretion to promulgate a regulation which is inconsistent with the governing statute." *Ontario Community Foundation v. State Board of Equalization*, 35 Cal.3d 811, 201 Cal.Rptr. 165,168 (1984). "Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." *Morris v. Williams*, 67 Cal.2d 733,737, 63 Cal.Rptr. 689 (1967).

The administrative interpretation is not binding on an appellate court. *Perdue v. Crocker National Bank*, 38 Cal.3d 913,935-6 (1985), *Carmona v. Division of Industrial Safety*, 13 Cal.3d 303,310, 118 Cal.Rptr. 473 (1975), *Skyline Homes, Inc. v. Occupational Safety & Health Appeals Bd.*, 120 Cal.App.3d 663,669, 174 Cal.Rptr. 665 (1981). This is

because a regulation cannot legitimately effect a change in a statute contrary to the legislature's intent. *Ontario Community Foundation, Inc. v. State Board of Equalization*, 35 Cal.3d 811,816-7, 201 Cal.Rptr. 165 (1984). "In any event, administrative construction of a statute, while entitled to weight, cannot prevail when a contrary legislative purpose is apparent." *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.*, 29 Cal.3d 101,117, 172 Cal.Rptr. 194 (1981).

THE CORRECT STATUTORY CONSTRUCTION OF 12 U.S.C. § 24(5) PREEMPTS STATE LAW CONTRACTUAL CAUSES OF ACTION

"The National Bank Act grants specified corporate powers to each national bank, including the power 'To . . . dismiss such officers or any of them at pleasure, and appoint others to fill their places.' (12 U.S.C. § 24, Fifth . . . .) It has been established for almost a century that section 24 preempts all state law causes of action by a bank officer for a breach of an employment agreement. (*Mackey v. Pioneer National Bank* (9th Cir.1989) 867 F.2d 520,524-526 . . . .; *Westervelt v. Mohrenstecher* (8th Cir.1896) 76 Fed. 118.) We are aware of no decision to the contrary, and plaintiffs do not dispute the general rule of preemption." *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1087-8, 282 Cal.Rptr. 841 (1991).

We concur in the Court of Appeals observation that, '. . . . Unless and until Congress acts to adjust the wording of the statute to meet the changed conditions in the banking industry, we look to the words of Paragraph Fifth [of section 24] for federal policy. We apply the statute strictly, according to its terms.' " *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1099, 282 Cal.Rptr. 841 (1991).

"[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood v. United States*, 350 U.S. 366,374, 76 S.Ct. 410,414, 100 L.Ed. 412 (1956).

> "Where, as here, the wording of a statute is unambiguous, it should be enforced fully as written. (Citations omitted). Here, the words 'dismiss... at pleasure' should be taken to signify exactly that, as courts in many jurisdictions have said for over a century. (See Annot. 111 A.L.R. 894 (1937).) Moreover, the fact that Congress has amended other portions of Section 24, Title 12 numerous times, without altering paragraph 5 indicates to us that that body continues to support the judiciary's consistent construction of paragraph 5."

Kemper v. First Natl. Bank in Newton, 94 Ill.App.3d 169, 418 N.E.2d 819,821 (1981).

"As a general rule of statutory construction, if a statute announces a general rule and makes no exception thereto, the courts can make none. (*Stockton Theatres, Inc. v. Palermo*, 47 Cal.2d 469,476, 304 P.2d 7 (1956)). A court may not insert into a statute a qualifying provision not included nor rewrite a statute to conform to an inferred intention that does not appear from its language. (*Mills v. Superior Court*, 42 Cal.3d 951,957, 232 Cal.Rptr. 141, 728 P.2d 211 (1986))." *Johnston v. Dept. of Personnel Administration*, 191 Cal.App.3d 1218, 236 Cal.Rptr. 853,856 (1987).

Here, the statute speaks for itself and preempts all causes of action in Respondent JOHN MARDULA's Complaint.

PRIOR PRECEDENTS FULLY SUPPORT THE "WELLS FARGO" DECISION IN DETERMINING THAT STATE LAW CAUSES OF ACTION ARE PREEMPTED BY 12 U.S.C. § 24(5)

The *Wells Fargo* decision was based on a long line of federal and sister state precedents consistently interpreting Paragraph Fifth.

"For instance, corporate bylaws or contractual provisions that purport to give a cashier a term of office are void (*Westervelt v. Mohrenstecher* (8th Cir.1896) 76 Fed. 118,122), and the contractual and tort claims of an executive vice president of a national bank based on a dismissal are completely barred. (*Mackey v. Pioneer National Bank* (9th Cir. 1989) 867 F.2d 520,522,525-6.)" *Wells Fargo Bank v. Superior Court*, 53 Cal.3d 1082,1105-6, 282 Cal.Rptr. 841 (1991), (Conc. Op., Kennard, J.).

The stage for interpreting the "at pleasure" provision was set in *Westervelt v. Mohrenstecher*, 76 Fed. 118 (8th Cir.1896). There, persons who had posted a bond to secure the performance of the bank's cashier refused to pay the bank's receiver on the ground that the bond expired when the prior cashier's one-year term ended. In spite of bylaws that set a one-year term, the court rejected the contention that the cashier's office had a one-year term. The Court explained:

> "The act of Congress expressly fixed the tenure of office of the cashier of this bank. It expressly provided that the board of directors might dismiss the cashier and certain other officers 'or any of them at pleasure and appoint others to fill their places.' It provided that this cashier should always hold his (or her) office subject to instantaneous removal at the pleasure of the board of directors. Nor is it at all probable that this

provision of the national bank act was inserted without purpose or consideration. Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are entrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys.... It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he (or she) lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success — to the very existence — of a banking institution that the board of directors should have the power to remove such an officer, and to put in his (or her) place another, in whom the community has confidence. In our opinion, the provision of the act of Congress to which we have referred was inserted, ex industria, to provide for this very contingency."

Westervelt v. Mohrenstecher, 76 Fed. 118,122 (8th Cir.1896).

Other sister state courts are in accord, even on the issue of severance pay.

"In our view, the arrangement under which the appellant [Bank] was required to pay Bennett, at the termination of his employment, a year's salary for unrendered services is directly contrary to the untramelled right to dismiss officers 'at pleasure' conferred by paragraph fifth of the National Bank Act." *International Bank of Miami v. Bennett*, 513

So.2d 1294 (Fla.App. 3 Dist. 1987), cert.denied, 485 U.S. 988 (1988).

In this case, the issue is the same: Can the bank be required to pay MARDULA six months severance pay?

In *Rhode v. First Deposit National Bank*, 127 N.H. 107, 497 A.2d 1214 (1985), a discharged officer of a national bank sought damages under his employment contract which had provided that if he were terminated without cause any time prior to the expiration of his three year contract, he would receive as compensation the salary due him for those three years. The court affirmed the dismissal of his claim on the ground that such a contractual provision contravened the bank's right to immediately discharge the officer.

The court in *Copeland v. Melrose National Bank*, 229 A.D. 311, 241 N.Y.S. 429, aff'd, 254 N.Y. 632, 173 N.E. 898 (1930), similarly refused to enforce a provision in a bank officer's employment contract requiring the bank to pay the remainder of the officer's salary for the unexpired period of his employment contract in the event of termination prior to the expiration of his contract.

In *Van Slyke v. Andrews*, 178 N.W. 959,960 (1920), the Metropolitan National Bank President agreed to resign as Bank President on condition that he would be elected as Chairman of the Board and that he (or his heirs) would receive payments of $1,000 per month for fourteen months. "The complaint further sets forth that plaintiff resigned the office of president.... in reliance on the agreement...." Three months later the new board of directors repudiated the agreement and refused to pay him $11,500 due under its terms. The court sustained "respondent's contention that the contract set forth in the complaint is void as against public policy.... [T]he national banking law expressly provides that any officer of a national bank may be removed at any time by the board of directors, and any contract which

would restrict the right to exercise this statutory power is necessarily void." 178 N.W. at 960.

PUBLIC POLICY SUPPORTS PREEMPTION

This court may take judicial notice of the extraordinary wave of bank mergers in the past few years. Bank of America's purchase of Security Pacific National Bank and Wells Fargo's purchase of First Interstate being the most notable California instances of this trend. But mergers have taken place at all levels of the banking industry over the past few years. All experts seem agreed that the consolidation in the industry will continue as a result of profound changes in the banking business.

To permit the existing officers of banks to insert severance pay provisions, sometimes known as "golden parachutes", into their renewed employment contracts invites self-dealing and "poison pill" defenses to hostile take overs. Banking is a highly regulated industry because banks, in effect, borrow money from their depositors at very low rates of interest due to the fact that such loans are guaranteed by the full faith and credit of the United States through the Federal Deposit Insurance Corporation. Fraud by highly placed bank officials was a principal cause of the Savings and Loan disaster, which, by its addition to the national debt, will affect every taxpayer for years to come. The dismissal at pleasure rule, applicable only to the highest bank officers (those hired and fired by the Boards of Directors itself) is not only the established law but it is good public policy as well.

CONCLUSION

WHEREFORE, Petitioner RANCHO DOMINGUEZ BANK, N.A. respectfully requests that this court grant its petition for certiorari.

Dated: December 6, 1996,

Respectfully submitted,

Roberts and Roberts

By:
Theodore K. Roberts
Attorneys for Petitioner

APPENDIX A

No. B085724. Second Dist., Div. Three. Mar. 15, 1996.

JOHN J. MARDULA, JR.,
Plaintiff and Appellant,

v.

RANCHO DOMINGUEZ BANK ET AL.
Defendants and Respondents

SUMMARY

After the president/chief executive officer of a national bank was discharged from his position, he brought an action against the bank seeking to enforce the bank's written agreement that its president would receive severance pay equal to six months' salary upon being discharged without cause. In a second count, plaintiff accused the bank and a bank director of tortiously denying the existence of a lawful contract. The trial court entered an order of dismissal after sustaining a demurrer, without leave to amend, to both of plaintiff's claims. The basis of the demurrer was a provision of the National Bank Act of 1864, 12 U.S.C. § 24, which provides that a national bank's officers may be dismissed at the pleasure of its board of directors. (Superior Court of Los Angeles County, No. BC 104006, David A. Workman, Judge.)

The Court of Appeal affirmed the order of dismissal as to the bank director and reversed as to the bank. The court held that with respect to plaintiff's first claim seeking to collect the agreed-on severance pay, the trial court erred in sustaining the bank's demurrer without leave to amend. The severance pay agreement did not violate either the letter or the spirit of 12 U.S.C. § 24. When a bank and its officer negotiate the officer's compensation agreement, both are presumed to be aware that by federal law, the officer may

become unemployed on a moment's notice, without warning or cause. In addition, the bank may wish to bargain for the officer's agreement that after the employment ends he or she will not immediately seek work with a local competitor. Thus, parties may choose to agree on a formula providing for a reasonable amount of severance pay. In this case, the agreement for six months' salary as severance pay neither prevented nor unreasonably interfered with the bank's statutory right to discharge plaintiff at the pleasure of its board of directors. However, plaintiffs second claim against both the bank and the director for tortious denial of contract was subject to dismissal based on a California Supreme Court decision abolishing that tort. (Opinion by Klein (Brett), J.,* with Klein, P. J., and Roskey, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) *Banks and Banking § 6 — Officers and Agents — At-will Employment of Officers Under National Bank Act — As Affecting Discharged Officer's Right to Contractual Severance Pay.* — In an action by the president/chief executive officer of a national bank against the bank after plaintiff was discharged from his position, in which plaintiff sought to enforce the bank's written agreement that its president would receive severance pay equal to six months' salary upon being discharged without cause, the trial court erred in sustaining the bank's demurrer without leave to amend. The basis of the demurrer was a provision of the National Bank Act of 1864, 12 U.S.C. § 24, which provides that a national bank's officers may be dismissed at the pleasure of its board of directors. However, the severance pay agreement did not violate either the letter or the spirit of 12 U.S.C. § 24. When

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*Judge of the Municipal Court for the Los Angeles Judicial District sitting under assignment by the Chairperson of the Judicial Council.

a bank and its officer negotiate the officer's compensation agreement, both are presumed to be aware that by federal law, the officer may become unemployed on a moment's notice, without warning or cause. In addition, the bank may wish to bargain for the officer's agreement that after the employment ends he or she will not immediately seek work with a local competitor. Thus, parties may choose to agree on a formula providing for a reasonable amount of severance pay. In this case, the agreement for six months' salary as severance pay neither prevented nor unreasonably interfered with the bank's statutory right to discharge plaintiff at the pleasure of its board of directors. However, plaintiff's second claim for tortious denial of contract was subject to dismissal based on a California Supreme Court decision abolishing that tort.

(See 6 *Witkin*, Summary of Cal. Law (9th ed. 1988) Torts, § 1358.]

COUNSEL

REHWALD, RAMESON, LEWIS & GLASNER
and
WILLIAM REHWALD
for Plaintiff and Appellant.

DANIEL ROBERTS, *in pro. per.*,
ROBERTS & ROBERTS
and
THEODORE K. ROBERTS
for Defendants and Respondents.

OPINION

KLEIN (Brett), J.*

John J. Mardula, Jr., appeals from an order of dismissal, entered after a demurrer was sustained, without leave to

*Judge of the Municipal Court for the Los Angeles Judicial District sitting under assignment by the Chairperson of the Judicial Council.

amend, to both claims pleaded in his complaint against respondents Rancho Dominguez Bank and Daniel Roberts. The appeal presents a question not yet decided by a California or federal court: whether section 24 of the National Bank Act, which provides that all officers of a national bank serve at the pleasure of its board of directors, precludes enforcement of a bank's written agreement that its president will receive severance pay if discharged without cause. We hold the severance pay agreement is enforceable.

I.

The complaint alleged the following facts. Rancho Dominguez Bank, a national bank, hired plaintiff in 1992 as president/chief executive officer, at an annual salary of $100,000. Plaintiff's ten-page employment agreement provided that plaintiff could be fired at any time without cause, but if he were — and if he had by then served for at least one year — he would receive severance pay equal to six months' salary. In 1994 the bank's board of directors fired plaintiff but refused to pay him severance pay exceeding one month's salary. In one count, plaintiff sought to collect the agreed-on severance pay. In the second count, plaintiff accused the bank and Roberts (a director) of tortiously denying "the existence of a lawful contract."

The basis of the demurrer was a provision of the National Bank Act of 1864, 12 United States Code section 24, which provides that a national bank's officers may be dismissed at the pleasure of its board of directors.[1] Respondents contend the contractual provision for severance pay is unenforceable

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[1] A national banking association "shall have power — [¶]. . .[¶] Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places." (12 U.S.C. § 24.)

because irreconcilable with the federal statute. We agree with plaintiff, however, that there is no inconsistency between the statute and a contract provision for a reasonable amount of severance pay.

II.

The case reports are replete with decisions, based on 12 United States Code section 24, that the firing of an officer of a national bank by its board of directors cannot be a wrongful act. One such case, *Aalgaard.v. Merchants Nat. Bank, Inc.* (1990) 224 Cal.App.3d 674, 686-695 [274 Cal.Rptr. 81], thoroughly surveyed the field, and it would serve no purpose to repeat or update what was said there. We note only that the cases demonstrate that section 24, and similar provisions covering employees of Federal Reserve Banks (12 U.S.C. § 341) and federally chartered thrift institutions (12 U.S.C. § 1432(a)) bar covered officers or employees from claiming that their discharge constituted (a) breach of a written employment contract (e.g., *Kemper v. First Nat. Bankin Newton* (1981) 94 Ill.App.3d 169 [49 Ill.Dec. 799, 418 N.E.2d 819] (bank president fired without cause before end of one-year term]); (b) breach of an oral promise of continued employment (e.g., *Mueller v. First Nat. Bank of the Quad Cities* (C.D.Ill. 1992) 797 F.Supp. 656, 660 [fired executive vice-president claimed breach of an oral agreement to employ him until he found another job]); (c) breach of an implied agreement for continued employment (e.g., *ibid* [fired executive vice-president also claimed breach of a contract implied from provisions in the employee handbook]); (d) breach of the implied covenant of good faith and fair dealing (e.g., *Aalgaard, supra*, 224 Cal.App.3d at pp. 689-692); (e) breach of a state-law principle forbidding discharge on grounds that contravene public policy (*Inglis v. Feinerman* (9th Cir. 1983) 701 F-2d 97, 99 (vice-president of Federal Home Loan Bank of San

Francisco claimed, inter alia, that he was fired for "his insistence that the Bank conform its practices to federal law]); and (f) violation of state antidiscrimination statutes (e.g., *Ana Leon T. v. Federal Reserve Bank of Chicago* (6th Cir. 1987) 823 F.2d 928, 931 [employee claimed she was fired in violation of state law forbidding employment discrimination based on national origin]; but see *Moodie v. Federal Reserve Bank of New York* (S.D.N.Y. 1993) 831 F.Supp. 333, 336-337). They do not, however, appear to bar claims that the discharge violated federal antidiscrimination statutes. (E.g., *Mueller v. First Nat. Bank of the Quad Cities, supra*, 797 F-Supp. 656, 660-663 [Age Discrimination in Employment Act of 1967 and Employee Retirement Income and Security Act of 1974 claims not barred]; *In re Sweeney* (Bankr.N.D. Ohio 1990) 113 Bankr. 359, 364 [bankruptcy discrimination claim not barred]; *Scott v. Federal Reserve Bank of New York* (S.D.N.Y. 1989) 704 F.Supp. 441, 447-448 [title VII claim not barred]; cf. *Bollow v. Federal Reserve Bank of San Francisco* (9th Cir. 1981) 650 F.2d 1093, 1100 [rejecting claim that age discrimination statute creates entitlement to continued employment at bank].)

These cases implement a forceful public policy that a nationally chartered bank must be free to remove and replace its officers at will. *Westervelt v. Mohrenstecher* (8th Cir. 1896) 76 Fed. 118, 122, explained this policy well: "[I]t is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them." So did *Aalgaard v. Merchants Nat. Bank, Inc., supra*, 224 Cal.App.3d 674, 689: "[A]t the heart of this inviolable dismissal provision is a linkage with public policy protecting the financial stability and fiscal integrity of banks by making it beyond the powers of bank directors to

enter into any contract restricting their ability to respond expeditiously to financial threats posed by bank officers." The policy is one of long standing; the "at pleasure" language has been in the statute for 131 years. (Act of June 3, 1864, ch. 106, § 8, 13 Stat. 101.)

III.

The question before us in this case, however, is not whether plaintiff's discharge from employment was a wrongful act; plaintiff agrees it was not. Rather, the question is whether 12 United States Code section 24 renders unenforceable the parties' bargain concerning severance pay.

In *Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082 [282 Cal.Rptr. 841, 811 P.2d 1025], the plaintiffs were discharged by bank officials other than the board of directors. The court held that 12 United States Code section 24 does not authorize at-will termination unless the termination is effected by the board of directors itself.[2] Although this decision is not on point, respondent bank relies heavily on the following remark found in our Supreme Court's opinion: "It has been established for almost a century that section 24 preempts all state law causes of action by a bank officer for breach of an employment agreement. [Citations] We are aware of no decision to the contrary . . . ." (53 Cal.3d at pp. 1087-1088.) The cases cited were *Mackey v. Pioneer Nat. Bank* (9th Cir. 1989) 867 F.2d 520, 524-526, and *Westervelt v. Mohrenstecher, supra*, 76 Fed. 118. Neither of the two cited cases involved a claim for severance pay. (Nor did *Wells Fargo Bank* itself.)

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[2]Compare *Mahoney v. Crocker Nat. Bank* (N.D.Cal. 1983) 571 F.Supp. 287, 290-292 (dictum: board of directors can delegate its 12 United States Code section 24 dismissal authority in the corporation's bylaws).

In *Mackey*, the bank's executive vice-president claimed he was hired by the bank president and wrongfully fired by the executive committee of the board of directors; he conceded that if it was the board of directors who had hired him and fired him, he could be fired at will, but contended that 12 United States Code section 24, while barring his contract claim, would not affect his tort claims. (867 F.2d at pp. 524-525.) The court ruled that he was an officer hired and fired by the board of directors, and held that section 24 barred his tort claims. The court observed that section 24 "has been consistently interpreted to mean that the board of directors of a national bank may dismiss an officer without liability for breach of the agreement to employ." (867 F.2d at p. 524.)

Westervelt presented a much different issue: whether a bond given to insure the fidelity of the bank's cashier expired automatically at the end of the cashier's initial one-year term of office. The court held the bond remained in effect until the cashier was removed from office or resigned. It observed that under 12 United States Code section 24, the cashier's term in office was not defined by the successive one-year periods for which the bank appointed him, but rather by a continuing tenure, subject to instantaneous removal at the pleasure of the board of directors.

Several other cases, in California and elsewhere, contain similar broad language to the effect that 12 United States Code section 24 preempts all breach of contract claims. But these cases did not involve severance pay, with the exception of six cases we will discuss below. An example is *Cox v. First Nat. Bank* (1935) 10 Cal.App.2d 302, 305 [52 P.2d 524], which contains a statement that a term contract with a national bank's cashier "is void and does not prevent his removal at any time by the board of directors. It will not support an action for damages for discharge nor permit recovery of salary accruing after such discharge." This

statement did not bear on any issue in the case, however; the court's ruling was that the evidence was insufficient to sustain the discharged cashier's factual assertion that while still employed he accrued vacation time and was paid less than the salary fixed by the board of directors.

An interpretive ruling by the United States Comptroller of the Currency, codified in the Code of Federal Regulations, provides that the board of directors of a national bank "may enter into employment contracts with its officers and employees upon reasonable terms and conditions." (12 C.F.R. § 7.5220 (1995).) Further, a national bank may adopt reasonable bonus, profit-sharing, stock option, and pension plans. (12 C.F.R. §§ 7.5000, 7.5010, 7.5015 (1995).) These rulings do not mention severance pay, but we observe that as a general matter, if a bank may enter into such contracts, surely it can be compelled to perform them.

IV.

There appear to be no federal cases on 12 United States Code section 24 and severance pay. Of the six sisterstate decisions we have found, only two invalidated severance-pay agreements.

In *Copeland v. Melrose Nat. Bank* (1930) 229 A.D. 311 [241 N.Y.S. 429] affd. mem., 254 N.Y. 632 [173 N.E. 898], the court invalidated the bank's agreement to continue paying its fourth vice-president his $8,000 annual salary through the end of his three-year term as "liquidated damages" if it were to fire him earlier. (The bank discharged him 14 months into his term.)

Sixty years later, though, a New York trial court, declining to follow *Copeland*, upheld a severance-pay agreement. (*Schmidt v. Park Avenue Bank* (1990) 147 Misc.2d 1043 [558 N.Y.S.2d 779].) There the parties agreed that if the bank fired its executive vice-president without cause within

two years, it would pay him one year's salary ($110,000) over the ensuing year. He served 18 months before his employment was terminated. The court held the salary continuation agreement did not violate 12 United States Code section 24, relying on the Comptroller's interpretive ruling, 12 Code of Federal Regulations section 7.5220 (1995), as undermining *Copeland.*

The other decision striking down a severance-pay agreement was *International Bank of Miami v. Bennett* (Fla.Dist.Ct.App. 1987) 513 So.2d 1294, certiorari denied, 485 U.S. 988 [99 L.Ed.2d 501, 108 S.Ct. 1291] (1988). There the bank, following a national search, hired a New Jersey banker as its new president, thereby inflicting on him a relocation to Florida. His three-year contract afforded him a year's salary (nearly $90,000), in the event of premature termination without cause, "as liquidated damages and severance pay." This was held "directly contrary to the untrammelled right to dismiss officers 'at pleasure'." (513 So.2d at p. 1295.)

The opposite conclusion, however, was reached recently by another district of Florida's District Court of Appeal. (*Stockwell v. Citizens Nat. Bank & Trust Co.* (Fla.DistCt.App. 1995) 655 So.2d 1220.) There the bank gave 2 officers 10-year employment agreements containing a provision that if an officer were discharged without cause, he would be paid his base salary, without raises, until the end of the 10-year term, and would also receive other benefits not described in the court's opinion. The officers alleged that the Comptroller had reviewed these agreements and approved them. Five years into the term, the bank fired both officers without cause and refused to honor its agreement. The court held that the officers could not sue for wrongful termination, but could enforce "all reasonable terms and conditions contained in the employment agreement." (655 So.2d at p. 1223.) It viewed the issue as "[w]hether federal statutes

and regulations permit a national bank to enter into a contract with an employee and thereafter ignore the terms of the contract which provided for termination benefits." (*Id.* at pp. 1221-1222.) It certified that its decision was in conflict with *Bennett*, and the Supreme Court of Florida granted review on October 17, 1995. (662 So.2d 931.)

A severance-pay agreement was upheld in *First Nat. Bank of Danville v. Reynolds* (Ind.Ct.App. 1986) 491 N.E.2d 218. There the bank president's three-year employment was terminable by either party upon ninety days' notice, and the contract provided that if more than a quarter of the bank's shares changed hands, the president could, upon resignation, receive compensation according to a formula. Approximately two years into the three-year term, the share contingency occurred, and the president, whose annual salary was $45,000, resigned and demanded the $36,346 due him under the formula. The court rejected the bank's contention that this agreement violated 12 United States Code section 24, in part because the president resigned and was not discharged.

Finally, a severance-pay agreement was upheld recently in *Ewert v. Drexel Nat. Bank* (1995) 271 M.App.3d 1124 [208 Ill Dec. 431, 649 N.E.2d 487]. There the bank president had a three-year employment contract at an annual salary of approximately $100,000. The contract provided that if he were discharged before the end of the three years, the bank would, as severance benefits, continue to pay an amount equal to his salary for the balance of the three-year term. The bank fired the president after only 10 weeks. It honored the severance-pay agreement for two years, then refused to pay the final nine and a half months' benefits. The court ruled the agreement was enforceable, relying in part on the

Comptroller's interpretive ruling, 12 Code of Federal Regulations section 7.5220 (1995).[3]

V.

(1) Turning to our own case, it is our determination that the amount of severance pay fixed in the parties' written bargain was not unreasonably great in relation to the contemplated sudden disruption of the bank president's income security should he be discharged without cause. The severance-pay agreement did not violate either the letter or the spirit of 12 United States Code section 24. When a bank and its officer negotiate the officer's compensation agreement, both are presumed to be aware that by federal law, the officer may become unemployed on a moment's notice, without warning or cause. In addition, the bank may wish to bargain for the officer's agreement that after his employment ends he will not immediately seek work with a local competitor. The parties may therefore choose to agree on a formula providing for a reasonable amount of severance pay. Some officers may be willing to accept a lower salary level in light of an agreement for reasonable severance pay. Here, the agreement for six months' salary as severance pay neither prevented nor unreasonably interfered with the bank's statutory right to discharge plaintiff at the pleasure of its board of directors. To hold otherwise would be to outlaw severance pay for bank officers, a rule we would not adopt absent more explicit legislation or more authoritative precedent.

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[3] In *Mitchell v. Am. Sav. & Loan Ass'n* (1979) 122 Ariz. 138 [593 P.2d 692] the court approved $11,250 in severance pay agreed upon at the time the officer was asked to resign, over the employer's objection that the agreement lacked consideration and violated a state public policy forbidding a corporate officer to accept a payment as an inducement to resign. Because the employer was not a national bank, 12 United States Code section 24 was not implicated.

At oral argument, respondent bank characterized the severance-pay agreement as a golden parachute. (This term was also used in the *Schmidt* and *Reynolds* cases, both of which upheld the agreement.) In this case, a half year's salary is insufficiently prodigal to warrant this pejorative label; it is an ordinary silk parachute. It is unnecessary in the present case to express a view on the validity of the more extravagant severance-pay agreements upheld in *Ewert* and *Stockwell.*

VI.

Plaintiff's second claim, against the bank and Roberts for tortious denial of contract, cannot survive the Supreme Court's decision abolishing that tort in *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85 [44 Cal.Rptr.2d 420, 900 P.2d 669], decided after this appeal was briefed. As respondent Roberts was named only in this count, the dismissal in his favor must be affirmed.

The order of dismissal is affirmed as to respondent Daniel Roberts and reversed as to respondent Rancho Dominguez Bank. Appellant to recover his costs from the Bank.

Klein, P. J., and Croskey, J., concurred.

APPENDIX B

SECOND APPELLATE DISTRICT, DIVISION THREE
B085724
S053183

IN THE SUPREME COURT OF CALIFORNIA

JOHN J. MARDULA, JR.,
Appellant

v.

RANCHO DOMINGUEZ BANK et al.,
Respondents

FILED JULY 17, 1996

Robert Wandruff, Clerk
Deputy

Petition for review DENIED.

GEORGE
Chief Justice

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHN MARDULA, Plaintiff, vs. RANCHO DOMINGUEZ BANK, DANIEL ROBERTS, and DOES 1-25, inclusive, Defendants.	)	Case No. BC104006 COMPLAINT FOR 1. Breach of Employment Contract 2. Bad Faith Denial of the Existence of a Contract

FILED MAY 3, 1994
Edward M. Kritzman, Clerk
By P. Offord, Deputy

COMES NOW, Plaintiff JOHN MARDULA, and complains against Defendants as follows:

1. At all times herein mentioned, Plaintiff JOHN MARDULA was a resident of the County of Los Angeles, State of California and had the capacity to enter into contracts.

2. At all times herein mentioned, Defendant RANCHO DOMINGUEZ BANK was a national bank authorized and existing under the laws of the State of California and the Federal Government.

3. At all times herein mentioned, Defendant DANIEL ROBERTS was a resident of the County of Los Angeles, State of California and had the capacity to enter into contracts.

4. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the Defendants was the agent, servant employee and joint venturer of each of the remaining Defendants, and was at all times acting within the course and scope of such agency, employment and joint venture.

5. The true names and capacities of Defendant DOES 1 through 25 are unknown to Plaintiff. Plaintiff will amend this Complaint to insert said true names and capacities when ascertained. Plaintiff is informed and believes, and upon such information and belief alleges, that each of said fictitiously named Defendants is liable to Plaintiff for the acts, events and occurrences alleged herein as a result of said Defendant's relationship to the other Defendants or participation in said acts, events and occurrences.

FIRST CAUSE OF ACTION
BREACH OF CONTRACT
AGAINST RANCHO DOMINGUEZ BANK, N.A.

6. Plaintiff incorporates and realleges the allegations contained in Paragraphs 1 through 5 of the preliminary allegations of this Complaint as though fully set forth herein.

7. On September 9, 1992, Plaintiff and Defendant entered into a written employment agreement wherein Plaintiff MARDULA was employed for the position of the President/Chief Executive Officer of the RANCHO DOMINGUEZ BANK (hereinafter sometimes referred to as the "BANK"). The contract provided that Plaintiff be paid the sum of One Hundred Thousand Dollars ($100,000.00) per

year for a term of three years. A copy of the employment contract is attached hereto marked as Exhibit 1, and incorporated herein by reference.

8. Paragraph IX A.(4) provides as follows:

> *Sale, Merger or Dissolution of Business:* In the event of a sale, merger, dissolution of business, or other substantial change in ownership or operation of the Employer's business, the Employer may, at the Employer's option, either terminate this Agreement or assign the Employer's interest in this Agreement to the successor entity. Should this Agreement be terminated, Employee shall be entitled to receive, immediately thereafter, one-quarter of the Employee's annual Basic Compensation for the first year of the Agreement and thereafter six months Basic Compensation at the rate prevailing at termination. Should the Agreement be assigned, the employer shall be released from all obligations pursuant to this Agreement.

9. In 1994, the BANK sold and merged. New board management took over requesting Plaintiff to stay on under the same terms and conditions.

10. On April 5, 1994, the Board of Directors passed the following resolution:

> *Following discussion upon motion made by Daniel Roberts and seconded by R. Scott Bonds, and unanimously carried, the Board of Directors approved that a request be made to John J. Mardula to resign as President and CEO of Rancho Dominguez Bank effective 4/5/94 with one month severance pay upon execution of a release of his employment contract/or terminate Mr. John J. Mardula effective immediately if no resignation is forthcoming.*

11. The Defendants, and each of them, have breached the employment contract in that the employment contract calls for a six month severance package.

12. As a direct and proximate result of the breach, Plaintiff has been damaged in an amount of $50,000.00.

SECOND CAUSE OF ACTION
BAD FAITH DENIAL OF THE EXISTENCE OF A CONTRACT
AGAINST ALL DEFENDANTS

13. Plaintiff incorporates and realleges the allegations contained in Paragraphs 1 through 5 of the preliminary allegations and Paragraphs 6 through 12 of the First Cause of Action of this Complaint as though fully set forth herein.

14. On or about April 5, 1994, Defendants, and each of them, breached in bad faith and denied the existence of a lawful contract entered into by and between Plaintiff and the Defendant BANK.

15. As a direct and proximate result of Defendants' bad faith denial of the existence of a contract, Plaintiff has been damaged in a sum that is unknown to him at the present time, but which Plaintiff is informed and believes and thereupon alleges exceeds the sum of $25,000.00. Said damages include lost benefits of his contract and general damages for physical injury and/or emotional distress damages. When Plaintiff learns the true and exact nature of the damage, Plaintiff will amend this Complaint.

16. The conduct of Defendants in wrongfully denying the existence of a contract was despicable and done with fraud, oppression and malice, entitling Plaintiff to punitive damages in a sum in excess of $25,000.00.

WHEREFORE, Plaintiff prays judgment for:

1. Special Damages according to proof;

2. General Damages according to proof;

3. Punitive Damages according to proof;

4. Cost of suit; and

4. For such other relief as the Court deems just and proper.

Dated: May 2, 1994

REHWALD RAMESON
LEWIS & GLASNER

By: WILLIAM REHWALD
WILLIAM REHWALD
Attorneys for Plaintiff

Plaintiff hereby requests a trial by jury of the within action.

Dated: May 2, 1994

REHWALD RAMESON
LEWIS & GLASNER

By: WILLIAM REHWALD
WILLIAM REHWALD
Attorneys for Plaintiff

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHN MARDULA, Plaintiff, v. RANCHO DOMINGUEZ BANK, DANIEL ROBERTS, and DOES and Does Inclusive, DEFENDANTS.	CASE No. BC104006 NOTICE OF MOTION AND MOTION ON DEMURRER BY DEFENDANTS RANCHO DOMINGUEZ BANK AND 1 to 25,) DANIEL ROBERTS; MEMORANDUM OF POINTS AND AUTHORITIES AND REQUEST FOR SANCTIONS DATE: July 7, 1994 TIME: 8:30 A.M. PLACE: Dept. 40 TRIAL DATE: None DISC. C/O: None MOTION C/O: None

FILED JUNE 8, 1994
Edward M. Kritzman, Clerk
By L. McGhee, Deputy

TO: PLAINTIFF JOHN MARDULA AND TO HIS ATTORNEYS OF RECORD, REHWALD RAMESON LEWIS A GLASNER:

PLEASE TAKE NOTICE that the Demurrer filed with this Notice has been set for hearing on July 7, 1994, at 8:30 A.M., or as soon thereafter as the matter may be heard in Dept. 40 of the above entitled Court located at 111 North Hill Street, Los Angeles, California 90012.

This Motion will be made on the grounds that the First and Second Causes of Action of the Complaint fail to state causes of action on which relief may be granted. This Motion is based on the Memorandum of Points and Authorities attached to this document, the pleadings, documents, records and files in this action and such other matters or evidence as may properly be presented to the Court at the time of the hearing on this Motion.

Defendants RANCHO DOMINGUEZ BANK and DANIEL K. ROBERTS further seek sanctions in the amount of $2,600.00 against Plaintiff JOHN MARDULA and his attorneys of record, REHWALD RAMESON LEWIS & GLASNER pursuant to Code of Civil Procedure § 128.5 for the reasons more fully discussed in the Memorandum of Points & Authorities.

Dated: June 2, 1994. ROBERTS AND ROBERTS

By: THEODORE K. ROBERTS
Theodore K. Roberts
Attorneys for Defendants
RANCHO DOMINGUEZ
BANK AND
DANIEL ROBERTS

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHN MARDULA,	CASE NO. BC104006
Plaintiff,	DEMURRERS BY DEFENDANTS
VS.	RANCHO DOMINGUEZ BANK AND DANIEL ROBERTS
RANCHO DOMINGUEZ BANK, DANIEL ROBERTS, and DOES 1-25, Inclusive,	DATE: July 7, 1994
	TIME: 8:30 A.M.
	PLACE: DEPT. 40
Defendants.	TRIAL DATE: None
	DISC. C/O: None
	MOTION C/O: None

TO: PLAINTIFF JOHN MARDULA AND TO HIS ATTORNEYS OF RECORD, REHWALD RAMESON LEWIS & GLASNER:

Defendants RANCHO DOMINGUEZ BANK and DANIEL K. ROBERTS hereby demur to the Complaint of Plaintiff JOHN MARDULA, on each of the following grounds:

DEMURRERS TO THE FIRST CAUSE OF ACTION

1. The First Cause of Action fails to state facts sufficient to constitute a cause of action against Defendants RANCHO DOMINGUEZ BANK and DANIEL K. ROBERTS because it is preempted by 12 U.S.C. § 24.

2. The First Cause of Action fails to state facts sufficient to constitute a cause of action against Defendant DANIEL K. ROBERTS because the written contract attached to the Complaint and incorporated by reference within it shows on its face that Defendant DANIEL ROBERTS is not a party to that contract.

DEMURRER TO THE SECOND CAUSE OF ACTION

3. The Second Cause of Action for bad faith denial of the existence of a contract fails to state facts sufficient to constitute a cause of action because there was, and is, no enforceable contract between Plaintiff and any of the defendants and, therefore, it was not bad faith to accurately deny that any alleged contract between the parties was unenforceable.

Dated: June 2, 1994.

ROBERTS AND ROBERTS

BY: THEODORE K. ROBERTS
Theodore K. Roberts
Attorneys for Defendants
RANCHO DOMINGUEZ
BANK AND
DANIEL ROBERTS

MEMORANDUM OF POINTS AND AUTHORITIES
STATEMENT OF FACTS

Many of the facts may be taken from the Complaint in this action. Paragraph 2 states: "At all times herein mentioned, Defendant RANCHO DOMINGUEZ BANK was a national bank authorized and existing under the Laws of the State of California and the Federal Government."

Paragraph 7 states: "On September 9, 1992, Plaintiff and Defendant entered into a written employment agreement wherein Plaintiff MARDULA was employed for the position of President/Chief Executive Officer of the RANCHO DOMINGUEZ BANK . . . ." Paragraph 7 incorporated by reference the written employment contract between RANCHO DOMINGUEZ BANK and JOHN J. MARDULA. It is dated September 9, 1992 and does not refer in any way to, and is not signed by, Defendant DANIEL K. ROBERTS.

Paragraph 10 admits: "On April 15, 1994, the Board of Directors passed the following resolution: ' . . . the Board of Directors approved that a request be made to John J. Mardula to resign as President and CEO of RANCHO DOMINGUEZ BANK effective 4/5/94 with one month severance pay upon execution of a release of his employment contract/or terminate Mr. John J. Mardula effective immediately if no resignation is forthcoming."

While the Complaint is actually silent on the main point, MARDULA did not resign and was terminated for cause immediately by said resolution of the Board of Directors of RANCHO DOMINGUEZ BANK.

Paragraph 11 states: "The Defendants, and each of them, have breached the employment contract in that the employment contract calls for a six month severance package."

Paragraph 14 of the Second Cause of Action for "Bad Faith Denial of the Existence of a Contract" alleges: "On or

about April 5, 1994, Defendants, and each of them, breached in bad faith and denied the existence of a lawful contract entered into by and between Plaintiff and the Defendant BANK."

THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT IS PREEMPTED BY 12 U.S.C § 24

The key case on the preemption of employment contracts between Bank officers and national banks is *Wells Fargo Bank v. Superior Court*, 228 Cal.App.3d 288, 267 Cal.Rptr. 49 (1990). An extended quotation from this case shows its application to the facts at hand. In *Wells Fargo*, bank employees had contracts which provided for severance pay but were terminated without cause or severance.

"If, however, these plaintiffs are classified as 'officers' under Paragraph Fifth and thus 'at will' employees, state law is preempted by federal law despite any contrary understanding between employer and employee. (See *Kozlowsky v. Westminster Nat. Bank* (1970) 6 Cal.App.3d 593,596-597, 86 Cal.Rptr. 52.) Thus, the key question is whether federal law dictates 'at will' employment status for these plaintiffs.

"Paragraph Fifth, adopted in 1864 (Act of June 3, 1864 ch.106 § 8, 13 Stat. 99,101), is part of the National Bank Act (12 U.S.C. § 24). It defines the corporate powers of national banking associations, including the power to make contracts, sue and be sued, prescribe bylaws and exercise all incidental powers necessary to carry on the business of banking. Two of its ten 'paragraphs' are pertinent here: 'a national banking association . . . shall have power - . . . [¶] Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them

at pleasure, and appoint others to fill their places. [¶] Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted and the privilegs granted to it by law exercised and enjoyed.'

"Wells Fargo contends that plaintiffs are 'officers' of the bank and are therefore subject to removal without cause." *Wells Fargo Bank v. Superior Court*, 228 Cal.App.3d 288, 267 Cal.Rptr. 49,51 (1990).

"To determine the scope of 'at will' employment by national banks, we must consider the purpose and function of Paragraph Fifth. The stage for interpreting the 'at will' provision was set in *Westervelt v. Mokrenstecher* (8th Cir.1896) 76 Fed 118. There, persons who had posted a bond to secure the performance of the bank's cashier refused to pay the bank's receiver on the ground that the bond expired when the prior cashier's one-year term ended. In spite of bylaws that set a one-year term, the court rejected the contention that the cashier's office had a one-year term. The Court explained: 'The act of Congress expressly fixed the tenure of office of the cashier of this bank. It expressly provided that the board of directors might dismiss the cashier and certain other officers "or any of them at pleasure and appoint others to fill their places." It provided that this cashier should always hold his (or her) office subject to instantaneous removal at the pleasure of the board of directors. Nor is it at all probable that this provision of the national bank act was inserted without purpose or consideration. Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are entrusted, should be subject to immediate removal when-

ever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys . . . . It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he (or she) lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success — to the very existence — of a banking institution that the board of directors should have the power to remove such an officer, and to put in his (or her) place another, in whom the community has confidence. In our opinion, the provision of the act of Congress to which we have referred was inserted, ex industria, to provide for this very contingency." (*Id.* at p 122.)

"Later decisions have used the 'at pleasure' provision of Paragraph Fifth to protect national banks and their customers from unwise employment agreements that would have provided security for key bank personnel. For example, in *Copeland v. Melrose Nat. Bank* (1930) 229 A.D. 311, 241 N.Y.S. 429, the bank agreed to employ its vice president for three years at a salary of $8,000 per year and to pay the rest of his salary as liquidated damages if it terminated him early. The *Copeland* court held that the bank had no authority to enter such an agreement, which conflicted with the employee's 'at will' status: 'In *Rankin v. Tygard*, [8th Cir.1912] 119 C.C.A 591, 198 F. 795, the statute was under consideration, and it was held that no term of office could be fixed which would prevent the bank from exercising its unrestricted power to remove an officer at pleasure during the term. [¶] Plaintiff's engagement was merely a hiring, terminable at the will of the directors. The intent of the statute was to place the fullest responsibility upon the directors by giving them the right to discharge such officers at pleasure. A contract for a definite term which forbids

such discharge except under the penalty of paying compensation for the full term violates the statute, and is unenforceable. To uphold the liquidated damages provision of the contract would be to contenance a patent subtrefuge designed to circumvent the law. It is idle to say that the statute merely gives the power to discharge the official, without the right to do so. The grant of the power carries with it the untrammeled right to its exercise, free from penalty.' (*Copeland, supra*, 241 N.Y.S. at p 430.)

"More recently, one court has observed: 'The case law uniformly interprets [Paragraph Fifth] and substantially similar provisions as rendering unenforceable, is against public policy, all contractual provisions which do not allow a national banking institution to discharge its officers at will without incurring liability for breach of contract. [Citations]' (*McGeehan v. Bank of New Hampshire, Nat. Ass'n* (1963) 123 N.H. 83, 455 A.2d 1054,1055)." *Wells Fargo Bank v. Superior Court*, 228 Cal.App.3d 288, 267 Cal.Rptr. 49,52-3 (1990).

"The consequence of finding an employee covered by this section are significant: not only does the employee serve at the pleasure of the appointing officer, but any employment agreement which states otherwise is void as against public policy." *Wells Fargo Bank v. Superior Court*, 228 Cal.App. 3d 288, 267 Cal.Rptr. 49,55 (1990).

THE FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT IS NOT PROPERLY STATED AGAINST DANIEL ROBERTS BECAUSE HE WAS NOT A PARTY TO IT

As previously indicated, Paragraph 7 of the Complaint incorporated by reference the written employment contract between RANCHO DOMINGUEZ BANK and JOHN J. MARDULA. It is dated September 9, 1992 and does not

refer in any way to, and is not signed by, Defendant DANIEL K. ROBERTS.

"Incorporating an exhibit by proper reference thereto in the pleading gives the pleader a convenient means of alleging the facts concerning the terms and effect of a document . . . ." 4 Witkin, *California Procedure*, Pleading § 381, p.431 (1985). However, the allegations of the contract attached to, and incorporated in the complaint take precedence over any inconsistent allegations in the complaint itself. See cases collected in 4 Witkin, *California Procedure*, Pleading § 385, p.433 (3rd Ed.1985).

Here the First cause of Action for breach of a written contract is stated against all defendants, including DANIEL ROBERTS, although he is not a party to the written contract, as its precise terms establish. Therefore, since Defendant DANIEL ROBERTS is not a party to the employment contract, it is improper to sue him for its breach.

THE SECOND CAUSE OF ACTION FOR BAD FAITH DENIAL OF THE EXISTENCE OF A CONTRACT MUST FAIL BECAUSE THERE WAS NO ENFORCEABLE CONTRACT

The elements of a cause of action for bad faith denial of a contract were first enunciated in *Seaman's Direct Buying Service v. Standard Oil Co.*, 36 Cal.3d 752,766, 206 Cal.Rptr. 354 (1984). In 5 Witkin, *California Procedure*, Pleading §§ 720-l, pp.167-8 (3rd Ed.1985), the *Seaman's* case is cited and the elements of the tort are explained. However, "plaintiff must allege the existence of a valid contract . . . ." 5 Witkin, *California Procedure*, Pleading § 721, p.167 (3rd Ed.1985).

Here, plaintiff has no enforceable contract against either Defendant for the reasons stated at length above. A fortiori, defendants are not liable for truthfully denying that there was an enforceable contract between Plaintiff MARDULA and Defendant RANCHO DOMINGUEZ BANK.

THESE DEMURRERS SHOULD BE SUSTAINED WITHOUT LEAVE TO AMEND

The issues presented by this Demurrer are essentially ones of law. "A trial Court may properly sustain a Demurrer to a Complaint without leave to amend when the matter presented can be determined as a matter of law." *Seymour v. State*, 156 Cal.App.3d 300, 201 Cal.Rptr. 15,18 (1984). Furthermore, a "general demurrer may be sustained without leave to amend where it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a cause of action." 5 Witkin, *California Procedure*, Pleading § 946, p.380 (3rd Ed. 1985).

SANCTIONS ARE APPROPRIATE

The cause of action for bad faith denial of the existence of a contract unwittingly establishes why sanctions should be imposed in this case. Plaintiff MARDULA knew that the change of ownership of the Bank was led by DANIEL ROBERTS, a licensed California attorney, and that ROBERTS told him that he had no enforceable contract with the Bank. Yet both Plaintiff and his Counsel made no effort to establish the applicable law and went forward with a Complaint which is in no way warranted under either California or federal law — after being told that federal law precluded Plaintiff from enforcing his contract.

Although Code of Civil Procedure § 128.5 refers to "frivolous actions or tactics" and does not specifically mention law suits, there is nothing in either the statutory language,

nor the decisions construing it, to suggest that "entire actions" are not covered. *Lesser v. Huntington Harbor Corp.*, 173 Cal.App.3d 922,928, 219 Cal.Rptr. 562 (1985). Sanctions may be awarded when some causes of action are frivolous even though others are not. *Bach v. McNelis*, 207 Cal.App.3d 852,875, 255 Cal.Rptr. 232 (1989).

The attached Declaration of Theodore K. Roberts establishes that Defendants have incurred $2,600.00 in attorney's fees in preparing this demurrer.

CONCLUSION

For the foregoing reasons, defendants RANCHO DOMINGUEZ BANK and DANIEL K. ROBERTS respectfully request that their Demurrers to Plaintiff's Complaint be sustained, and that such Demurrers be sustained without leave to amend.

Dated: June 2, 1994

ROBERTS AND ROBERTS

By: /s/ THEODORE K. ROBERTS
Theodore K. Roberts
Attorneys for defendants
RANCHO DOMINGUEZ BANK
and DANIEL K. ROBERTS

DECLARATION OF THEODORE K. ROBERTS

I, Theodore K. Roberts, hereby declare and state:

(1) I am an attorney at law licensed to practice before all courts in the State of California and I am making this declaration in support of Defendant RANCHO DOMIN-

GUEZ BANK and DANIEL ROBERTS' demurrer to the Complaint in this action.

(2) The facts set forth herein are personally known to me, and if called as a witness, I could and would competently testify thereto under oath.

(3) Prior to Daniel Roberts purchase of the overwhelming number of shares in RANCHO DOMINGUEZ BANK, there was discussion of the retention of officers and the legal liability of the BANK if officers were terminated at the time that there was a transfer in control of the BANK by the office of the Controller of the Currency.

(4) At DANIEL ROBERTS request, who is my brother and law partner, I researched the question and found the case of *Wells Fargo v. Superior Court*, which established that liquidated damages provisions and severance packages in employment contracts of BANK employees who served at the pleasure of the Board of Directors of the BANK were unenforceable.

(5) On April 5, 1994, prior to the Board of Directors meeting, BANK President JOHN MARDULA was informed that his employment contract was unenforceable as is alleged in the second cause of action of the Complaint.

(6) Nevertheless, MARDULA and his attorneys have brought this action which is not warranted under the law or the facts.

(7) The legal research on these questions, the preparation of the demurrer, and attendance at the hearing will require a total of 13 hours of work at $200.00 per hour. The BANK will be billed this amount, which is requested as sanctions under Code of Civil Procedure § 128.5.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 2, 1994 at Los Angeles, California.

/s/ THEODORE K. ROBERTS

Theodore K. Roberts

APPENDIX F

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/07/94

HONORABLE DAVID A. WORKMAN, Judge

HONORABLE EDWIN TRANG, CSL, Deputy Sheriff

DEPT. 40

M. REINOSO, Deputy Clerk

8:31 am BC104006

JOHN MARDULA

vs.

RANCHO DOMINGUEZ BANK,

etc., et al.,

WILLIAM REHWALD *Plaintiff Counsel*

DANIEL K. ROBERTS *Defendant Counsel*

NATURE OF PROCEEDINGS:

DEMURRER OF DEFENDANTS TO COMPLAINT

The demurrer is sustained, without leave to amend, on the ground that 12 U.S.C. section 24 preempts the complaint's causes of action. Wells Fargo Bank v. Superior Court (1991) 53 Cal.3d 1082, 1087, 1088; Mackey v. Pioneer National Bank (9th Cir. 1989) 867 F.2d 520, 525.

The respective requests for sanctions are denied.

On notion of the defendants, the complaint is dismissed. Code of Civil Procedure section 581(f)(1).

/s/ DAVID A. WORKMAN
David A. Workman
Judge of the Superior Court

Notice by defendants/moving parties.

Supreme Court, U.S.
FILED
JAN 30 1997
CLERK

(2)

No. 96-922

In The

Supreme Court of the United States

October Term, 1996

MERCHANTS BANK OF CALIFORNIA, N.A.,
(formerly known as RANCHO DOMINGUEZ BANK),

Petitioner,

vs.

JOHN MARDULA, Jr.,

Respondent.

**On Petition For Writ Of Certiorari To
The California Court Of Appeal
– Second Appellate District**

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM REHWALD,
CA State Bar #51396
REHWALD RAMESON LEWIS
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OR CALL COLLECT (402) 342-2831

28 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF FACTS 2

REASONS FOR DENYING THE WRIT 5

The Published Decision Below, Reversing Dismissal By The Superior Court Of Los Angeles Is Not A final Judgment That May Be Reviewed By This Court, And In Any Event, Neither Conflicts With Any Decision Of This Court, Or Other Lower Courts, Nor Presents A Significant Issue Of Federal Law. 5

1. This Court Does Not Have Jurisdiction Under 28 U.S.C. § 1257 Because There Has Been No Final Judgment Below 5

2. Federal Law Does Not Preclude A Bank From Entering Into An Employment Contract. That Includes As One Of Its Terms And Conditions The Obtainment Of Reasonable Severance Upon Termination Of Employment 6

3. Several States Have Followed The Comptroller Of Currency's Regulation, Found At 12 C.F.R. § 7.5220, Granted The Board Of Directors' Authority To Enter Into Employment Contracts With Its Officers And Employees Upon Reasonable Terms And Conditions 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES CITED

Copeland v. Melrose National Bank, 229 A.D. 311, 241 NYS 429, affirmed, 254 NY 632, 173 NE 898 (1930) 9

Ewert v. Drexel National Bank, 271 M.App.3d 1124 [208 Ill. Dec. 431, 649 N.E.2d 487] (1995) 10

First National Bank of Danville v. Reynolds, 491 N.E.2d 218 (Ind.Ct.App. 1986) 10

International Bank of Miami v. Bennett, 513 So.2d 1294, certiorari denied, 485 U.S. 988 (Fla.Dist. Ct.App. 1987) 9, 10

Meagher v. Minnesota Thresher Mfg. Co., 145 U.S. 608 (1892) 5

Pope v. Atlantic Coast Line R. Co., 345 U.S. 379 (1953) 6

Schmidt v. Park Avenue Bank, 147 Misc.2d 1043, 558 NYS2d 779 (1990) 9

Southern Pacific Co. v. Gileo, 351 U.S. 493 (1956) 5

Stockwell v. Citizens National Bank & Trust Co., 655 So.2d 1220 (Fla.Dist.Ct.App. 1995) 10

Werner v. City Council of Charleston, 151 U.S. 361 (1894) 5

STATUTES CITED

12 C.F.R. § 7.5220 9

12 U.S.C. § 24 ..... 4, 6, 7, 9

28 U.S.C. § 1257 ..... 1, 5

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent John Mardula respectfully opposes the Merchant Bank of California's Petition for Writ of Certiorari to review the published opinion of the California Court of Appeal, Second Appellate District, Division Three.

OPINIONS BELOW

California Court of Appeal, Second Appellate District, Division Three, reversed the dismissal of Respondent's Complaint and ordered the matter returned to the Los Angeles Superior Court for a trial on the factual merits. California Supreme Court denied Petitioners' request for review. At present time, no final judgment is entered in *Mardula v. Rancho Dominguez Bank,* Los Angeles Superior No. BC 104006.

JURISDICTION

The Petitioner incorrectly argues that jurisdiction of this Court is proper because the California Supreme Court has either affirmed or denied the validity of a judgment of an inferior court over which it, by law, can exercise appellate authority, assuming that a federal question is presented. See 28 U.S.C. § 1257. Respondent maintains that this Court does not have jurisdiction because there has been no final judgment below.

STATEMENT OF FACTS

On September 9, 1992, Petitioner and Respondent entered into a written employment agreement, wherein Respondent was employed in the position of President and Chief Executive Officer of Rancho Dominguez Bank (now Merchant's Bank of California, N.A.) The contract provided that Respondent would be paid the sum of $100,000 per year for a term of three years commencing on September 18, 1992 and continuing until September 30, 1995. In 1994, the Petitioner was sold and merged; the majority shareholder of the new management team included DANIEL K. ROBERTS, one of the counsel in this matter.

On April 5, 1994, Respondent was requested to resign from his position as President and Chief Executive Officer. The resignation request was passed by a unanimous resolution of the Board of Directors on April 5, 1994 and was effective immediately. Respondent was offered a one month severance package upon the execution of a release of his employment contract or, alternatively, if Respondent did not sign such a release, his termination would be effective immediately. Respondent's Employment Agreement with Rancho Dominguez Bank dated September 9, 1992 expressly provides upon termination for cause for reasons of disability the Respondent shall receive a "severance amount in semi-monthly installments equivalent to one-quarter of the employee's annual basic compensation in effect at the time of termination for the first year of the agreement and thereafter an amount equivalent to one-half the employee's annual basic compensation in effect at the time of the employee's termination." See Appendix 1.

Respondent's termination was effective on April 5, 1994, over a year and seven months after the effective date of the Employment Agreement. The September 9, 1992 Employment Agreement further provides, upon Petitioner's termination of Respondent, without cause, that Respondent is also entitled to "a severance amount equivalent to one-quarter the employee's annual basic compensation at the time of termination for the first year of the agreement and thereafter an amount equivalent to one-half the employee's annual basic compensation in effect at the time of the employee's termination."

The Employment Agreement also provides that, upon the "sale, merger, dissolution of business, or other substantial change of ownership or operation of the employer's business, employer may, at the employer's option, either terminate this agreement or assign the employer's interest in this agreement to the successor entity. Should this agreement be terminated, employee shall be entitled to receive, immediately thereafter, one-quarter of the employee's annual basic compensation for the first year of the agreement, and thereafter, six months' basic compensation at the rate prevailing at termination. Should the agreement be assigned, the employer shall be released from all obligations pursuant to this agreement."

The Employment Agreement also calls for post-termination obligations on the part of Respondent. This included the obligation not to use a customer list for two years following termination of the agreement; Respondent was further obligated not to solicit the employer's customers and co-employees for two years following the termination of the agreement. Finally, Respondent was

obligated not to compete with the employer for a period of one year within a radius of five miles of any of the employer's principal places of business in any county of California.

On June 29, 1994, Respondent filed his Complaint in the Los Angeles County Superior Court, entitled *John Mardula v. Rancho Dominguez Bank*, Case No. BC 104006 for damages against Rancho Dominguez Bank. Respondent claimed that Rancho Dominguez Bank refused to pay him his six month severance package upon his termination as provided for in the Employment Agreement entered into by and between Respondent and the Bank.

Petitioner demurred to the Complaint, which came for hearing on July 7, 1994 before the Honorable David A. Workman, Judge for the Los Angeles County Superior Court. The Court sustained Petitioner's demurrer without leave to amend. The matter was subsequently dismissed with prejudice pursuant to the ruling on the demurrer. Respondent filed a timely Notice of Appeal.

At the hearing on the Demurrer, the Honorable David A. Workman was under the mistaken impression that 12 U.S.C. § 24 preempted any cause of action by Respondent and that Rancho Dominguez Bank could not enter into any contractual term with Respondent, limiting its liability upon termination of employment.

On March 15, 1996, the Second Appellate District, Division Three, reversed the granting of the Demurrer and returned the matter to the Los Angeles Superior Court, where the matter is currently scheduled for trial

on January 6, 1997. No final judgment has yet to be entered.

REASON FOR DENYING THE WRIT

The Published Decision Below, Reversing Dismissal by the Superior Court of Los Angeles Is Not a Final Judgment That May Be Reviewed by this Court, and in Any Event, Neither Conflicts with Any Decision of this Court, or Other Lower Courts, Nor Presents a Significant Issue of Federal Law.

1. This Court does not have Jurisdiction Under 28 U.S.C. § 1257 Because There has been No Final Judgment Below.

The first reason why the Petition should be denied is there has been no final judgment below and therefore there is no jurisdiction under 28 U.S.C. § 1257. The State Supreme Court refused to grant review of the Court of Appeal decision, reversing the Trial Court's granting of a Demurrer without leave to amend. This Court has repeatedly held that the decision of a State Appellate Court either affirming or denying the refusal to dismiss an action is not final and consequently that review cannot be had under Section 1257. *Werner v. City Council of Charleston*, 151 U.S. 361 (1894); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 610-611 (1892). See also *Southern Pacific Co., v. Gileo*, 351 U.S. 493, 496 (1956).

In this case, Petitioner has raised the defense of preemption of federal law – that is, it denies that it has any obligation to pay Respondent's severance because federal law renders the clause of the contract unenforceable. It is

thus quite possible that the case may be resolved in the State Courts without any need to consider the federal preemption defense. Accordingly, there is no basis for a grant of certiorari under Section 1257. See *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 381-382 (1953).

2. Federal Law Does Not Preclude a Bank from Entering into an Employment Contract. That Includes as One of its Terms and Conditions the Obtainment of Reasonable Severance Upon Termination of Employment.

Petitioner argues that a national bank governed under 12 U.S.C. § 24 is forever precluded from entering into an employment agreement with its officers and employees providing for the payment of severance because it would limit a bank's ability to terminate without cause. If a bank has to honor its contract calling for the payment of severance which it negotiated with the bank officer, such obligation would interfere with the bank's ability to freely terminate its employees, because of possible financial detriment. In the contract at hand, Petitioner had the unfettered right to terminate Respondent's employment, with or without cause, at any time. Moreover, if Respondent had habitually neglected his duties as President, wilfully breached the duties of his contract, or engaged in illegal activity Petitioner would have no obligation to pay Respondent severance. Here, however, new management had purchased the bank and initially asked Respondent to stay on at the Bank. Then, upon coming on the Board, management made the decision to terminate Respondent. If Respondent had executed a general release, the Petitioner would have paid

Respondent one month severance instead of the six called for in his Employment Agreement. None of Respondent's post-termination duties under the Employment Agreement were nullified.

Respondent has never argued, nor did the Court of Appeal ever hold that the firing of Respondent by the Board of Directors was a wrongful act. The Courts have consistently held that an officer or employee cannot claim that their discharge constituted a breach of the written employment agreement, a breach of an oral promise of continued employment, breach of an implied agreement for continued employment, breach of an implied covenant of good faith and fair dealing, breach of a state law principle forbidding discharge on grounds that contravene public policy, and violation of state anti-discrimination statutes. The California Court of Appeal reaffirmed all those principles and held that a nationally chartered bank must be free to remove and replace its officers at will. See *Mardula v. Rancho Dominguez Bank*.

The Court, however, posed the question of whether 12 U.S.C. § 24 renders unenforceable the parties' bargain concerning severance pay. In that connection, the Court of Appeal said as follows:

> Turning to our own case, it is our determination that the amount of severance pay fixed in the parties' written bargain was not unreasonably great in relation to the contemplated sudden disruption of the bank president's income security should he be discharged without cause. The severance-pay agreement did not violate either the letter or the spirit of section 24. When a bank

> and its officer negotiate the officer's compensation agreement, both are presumed to be aware that by federal law, the officer may become unemployed on a moment's notice, without warning or cause. In addition, the bank may wish to bargain for the officer's agreement that after his employment ends he will not immediately seek work with a local competitor. The parties may therefore choose to agree on a formula providing for a reasonable amount of severance pay. Some officers may be willing to accept a lower salary level in light of an agreement for reasonable severance pay. Here the agreement for six months' salary as severance pay neither prevented nor unreasonably interfered with the bank's statutory right to discharge plaintiff at the pleasure of its board of directors. *To hold otherwise would be to outlaw severance pay for bank officers, a rule we would not adopt absent more explicit legislation or more authoritative precedent.* At oral argument, respondent bank characterized the severance-pay agreement as a golden parachute. (This term was also used in the *Schmidt* and *Reynolds* cases, both of which upheld the agreement.) In this case, a half-year's salary is insufficiently prodigal to warrant this pejorative label; it is an ordinary silk parachute. It is unnecessary in the present case to express a view on the validity of the more extravagant severance-pay agreements upheld in *Ewert* and *Stockwell*.

The California Appellate Court held that six months severance in the sum of $50,000 was reasonable and not made unenforceable by federal law.

3. Several States Have Followed the Comptroller of Currency's Regulation, Found at 12 C.F.R. § 7.5220, Granted the Board of Directors' Authority to Enter into Employment Contracts with its Officers and Employees upon Reasonable Terms and Conditions.

In 1971, the Comptroller of Currency promulgated regulations interpreting 12 U.S.C. § 24, paragraph fifth. In that connection, the Comptroller of Currency enacted a regulation that provides: "The Board of Directors of a National Bank, pursuant to paragraph fifth of 12 U.S.C. § 24, may enter into employment contracts with its officers and employees upon reasonable terms and conditions." As noted by the California Court of Appeal, six Sister State decisions were found involving severance payments to terminated bank executives. In only two of those cases were the severance pay agreements invalidated. In the first, *Copeland v. Melrose National Bank* (1930) 229 A.D. 311, 241 NYS 429, affirmed, 254 NY 632, 173 NE 898, the decision was reached some 40 years before the Comptroller of Currency passed 12 C.F.R. § 7.5220. However, 60 years later, the New York Trial Court declined to follow *Copeland* and upheld a severance agreement in the case of *Schmidt v. Park Avenue Bank* (1990) 147 Misc.2d 1043, 558 NYS2d 779. In that case, the Court held the salary continuation agreement did not violate 12 U.S.C. § 24, relying on the Comptroller's interpretive ruling 12 C.F.R. § 7.5220. In 1987, a Florida Court refused to enforce a severance clause as liquidated damages. See *International Bank of Miami v. Bennett* (Fla.Dist. Ct.App. 1987) 513 So.2d 1294, certiorari denied, 485 U.S. 988. However, an opposite conclusion was reached by the Florida District

Court of Appeal in the case of *Stockwell v. Citizens National Bank & Trust Co.* (Fla.Dist.Ct.App.1995) 655 So.2d 1220. In that case, a Florida Court held that an officer could not sue for wrongful termination, but could enforce "all reasonable terms and conditions contained in the employment agreement." (655 So.2d at 1223.)

The Florida Supreme Court granted review and upheld the payment of severance. In disapproving of *Bennett*, the Florida Court held there was nothing that made the payment of severance void as against public policy (675 So.2d 584). The bank could not have its proverbial cake and eat it too. Banks cannot entice officers to work for them and then refuse to honor their contractual obligations by a tenuous interpretation of the Act. The Bank retained its power to terminate even though it must honor the severance contract.

A severance pay agreement was also upheld in the case of *First National Bank of Danville v. Reynolds* (Ind.Ct.App. 1986) 491 N.E.2d 218 and *Ewert v. Drexel National Bank* (1995) 271 M.App.3d 1124 [208 Ill. Dec 431, 649 N.E.2d 487]. In those cases, the Courts found the severance payment provisions to be reasonable under the circumstances and therefore not unenforceable. The California Court, in its opinion below, did not express any view on the validity of a more extravagant severance pay agreement that might be called a "golden parachute." The California court held that a half-year's salary was insufficiently prodigal to warrant the pejorative label, "golden parachute." Nor can it be said that such a clause invites "self dealing," nor can it be called "a poison pill" as suggested by Petitioner. Most important, the severance

pay formula was negotiated at the beginning of Respondent's employment, not when the Bank was on the verge of takeover. Rather, a reasonable severance payment allows a bank officer to land a new job in a new community. The provision is sufficiently reasonable in view of Respondent's post-termination obligations under the contract.

CONCLUSION

The published decision below reversing a dismissal of Respondent's Complaint after the granting of a demurrer is not a final judgment that may be reviewed by this Court and, in any event, neither conflicts with any decision of this Court or any other lower Court, nor presents a significant issue of federal law.

Therefore, this Court should deny Petitioner's request for certiorari in its entirety.

DATED: January 30, 1997

Respectfully submitted,

REHWALD RAMESON LEWIS & GLASNER

WILLIAM REHWALD
Attorneys for Respondent
JOHN MARDULA

APPENDIX 1

RANCHO DOMINGUEZ BANK. N.A.

EMPLOYMENT AGREEMENT

I AGREEMENT: This agreement ("Agreement") is between John J. Mardula, Jr. ("Employee") and Rancho Dominguez Bank, N.A. ("Employer") and defines the employment relationship between the Employee and the Employer. The Employee and the Employer promise to be bound by the obligations following, and these promises represent the full and mutual consideration for this Agreement.

II DESCRIPTION OF THE EMPLOYER: The Employer is a National banking corporation that will be engaged in the business of banking with its principal place of business located in Carson, California.

III THE EMPLOYEE'S POSITION AND DUTIES: The Employee shall hold the position of the Employer's President/Chief Executive Officer, and, subject to control by the Employer's Board of Directors, the duties of that position shall include, but are not be [sic] limited to, managing the Employer's business, promoting the Employer's business, managing all other employees of the Employer, reporting to the Employer's Board of Directors, and maintaining compliance with all laws and regulations that affect the Employer's business. The Employee shall serve as a Director on the Employer's Board of directors.

IV EMPLOYEE COMPENSATION:

A. Basic Compensation: From commencement of employment under this Agreement, 9/18/92 and until 9/30/95, a term of 3 years of service, unless sooner terminated, the Employer shall

pay the Employee semi-monthly, basic compensation at a rate equivalent to $100,000 per year. Each consecutive calendar year thereafter, the Employee's rate of pay shall be set by Board of Directors of Employer in conjunction with his annual performance review. The Employee shall receive no additional compensation for serving as a Director on the Board of Directors.

B. Bonus: Employer intends to pay Employee a bonus in reward for exceptional performance of the duties set forth herein. However, any bonus paid is entirely at the discretion of the Board of Directors, and nothing herein shall be construed as an agreement to require the Board of Directors to grant any bonus. Any bonus shall be paid at the end of each consecutive calendar year of service, beginning 12/31/93, under this Agreement. In the exercise of its discretion in awarding such bonuses, the Employer will consider the profitability, loan and deposit growth, and the quality of loan portfolio of the Employer. The parties agree that the following guidelines relative to profits are reasonable in determining such bonus:

(1) First Year: Up to December 31, 1993, in its absolute discretion, the Board of Directors may award Employee a bonus or bonuses based upon Employer's and Employee's performance. Granting of such bonus or bonuses shall be further subject to compliance with applicable regulatory requirements.

(2) Second and Subsequent Calendar Years: Starting with the 1994 calendar year, 6% of net pre-tax earnings of the

Employer, excluding profits generated by sale of assets and including loan losses, as well as additions to loan loss reserves, computed for purposes of bonus calculation at 1 1/2% of loans made during the year. The term "net pre-tax profit" shall be defined and determined, through recognized and accepted accounting standards, as recommended and approved by Employer's accounting firm.

The foregoing guidelines may be improved from time to time with respect to Employee's bonus, but said guidelines will not be diminished in any way and nothing in the guidelines shall require the Employer to grant a bonus which exceeds the total salary payment made for the year for which a bonus may be granted.

V EMPLOYEE BENEFITS:

A. Group Medical and Life Insurance Benefits: The Employer shall provide Employee with term life insurance benefits in the total aggregate amount of $135,000. The Employer shall also provide for Employee, at Employer's expense, participation for Employee in medical, dental, vision, and accident and health insurance benefits comparable to those benefits available from time to time under the California Bankers Association Group Insurance Program for key executives.

B. Vacation: The Employer shall provide the Employee four (4) weeks of paid vacation for each twelve (12) months of service. The Employee must take not less than two consecutive weeks of such vacation for each 12 months of service, and at the election of the Employee,

the Employee may take the remainder of the vacation, be paid for the remainder of the vacation, or carry the remainder of the vacation forward to the next calendar year.

C. Stock Option: The Employer's Board of Directors agrees to grant to Employee stock options covering four percent (4%) of the amount of the Employer's initial issuance of common stock, at a purchase price per share equal to the per share price of the current selling price of the Employer's stock at the date of hire, on such terms and conditions as may be contained in Stock Option Agreements to be entered into by and between the Employer and Employee. The Employer agrees that such options shall vest in equal installments over a period of three (3) years, and will be for a term of six (6) years. Upon termination of Employee's employment by Employer for cause, all stock options held by Employee, whether vested or not, shall immediately expire without any notice to Employee being required. Upon termination of Employee's employment by Employer for any other reason, Employee (or Employee's personal representative in the event of termination by death or incapacity) shall have ninety (90) days from the date of termination to exercise any options that had vested as of the date of termination. Upon termination of this Agreement, the Employee (or Employee's personal representative in the event of termination by death or incapacity) must offer for sale to the Employer, including any stock acquired as a result of the exercise of vested stock options during the ninety (90) day period following termination of employment.

The Employer shall not be obligated to purchase such stock, but may elect, at its sole discretion, to accept or reject all or any part of such stock. In the event of a merger, consolidation or other reorganization involving the Employer, the Employee's stock option shall become exercisable in full as to all shares subject to option, whether otherwise vested or not, commencing thirty (30) days prior to the proposed date of merger, consolidation or other reorganization. In the event the Employee exercises such option, but such merger consolidation or other reorganization is not consummated on the proposed date, Employee shall have a period of sixty (60) days from such proposed date to rescind the purchase, in which event the shares as to which the option was exercised shall become again subject to option on the terms set forth in the Agreement.

VI EMPLOYEE EXPENSES:

A. Reimbursement for Business Expenses: Employee shall be entitled to reimbursement by Employer for any ordinary and necessary business expenses incurred by Employee in the performance of Employee's duties and in acting for the Employer during the term, which types of expenditures shall be determined by the Employer's Board of Directors, provided that:

(1) Each such expenditure is of a nature qualifying it as a proper deduction on the federal and state Income Tax Returns of the Employer as a business expense and not as deductible compensation to Employee and;

(2) Employee furnished to the Employer adequate records and other documentary evidence required by federal and state statutes and regulations issued by the appropriate taxing authorities for the substantiation of such expenditures as deductible business expenses of the Employee and not as deductible compensation to the Employee.

VII PROTECTION OF BUSINESS INFORMATION:

A. During Employment: Prior to termination of this Agreement, the Employee shall have the following obligations:

(1) No Competition: The Employee shall not, on behalf of the Employee or any other, compete with the Employer.

(2) No Planning to Compete Following Employment: The Employee shall not plan or otherwise prepare to compete with the Employer following the Employee's employment with the Employer.

(3) No Solicitation of Employees to Compete: The Employee shall not solicit other employees of the Employer to compete with the Employer following the Employee's employment with the Employer.

(4) No Disclosure: The Employee shall not disclose to any person who has no business reason to know, any papers or other materials containing business information of the Employer, any confidential information of the Employer, any business ideas

of the Employer, any names of any customers of the Employer, or any names of any employees of the Employer.

B. Following Employment: Upon termination of this Agreement, the Employee shall have the following obligations:

(1) Return of Business Information: The Employee shall deliver to the Employer all papers and other materials containing business information that the Employee acquired during employment with the Employer.

(2) No Use of Trade Secrets: The Employee may use no trade secret acquired from the Employer before, during or after the Employee's employment with the Employer.

(3) No Use of Confidential Information: The Employee may use no confidential information acquired from the Employer before, during or after the Employee's employment with the Employer.

(4) No Use of Business Ideas: The Employee may use no business ideas, acquired from the Employer before, during or after the Employee's employment with the Employer.

(5) No Use of Customer Lists: For two years following the termination of this Agreement, the Employee may use no customer lists acquired from the Employer before, during or after the Employee's employment with the Employer.

(6) No Solicitation of Employer's Customers: For two years following the termination of this Agreement, the Employee may not solicit any customer of the Employer held by the Employer during the Employee's employment with the Employer.

(7) No Solicitation of Employer's Employees: For two years following the termination of this Agreement, the Employee may solicit for employment elsewhere, no employee of the Employer that was employed by the Employer during the time of the Employee's employment with the Employer.

(8) No Local Competition for One Year: If the Employer elects to purchase all of the Employee's stock and options, as described in the Stock Options provision of the Agreement, the Employee shall agree with the Employer in consideration for the agreement to purchase, to not compete with the Employer for a period of one year within a 5 mile radius of any of the Employer's principal places of business in any California county.

C. Remedies for Breach of Obligations Regarding Business Information: In addition to the Employer's remedies at law for any breach of the Employee's obligation regarding protection of business information, the Employee acknowledges that the Employee's duties are of a special, unique, unusual, extraordinary, or intellectual character, which gives them peculiar value that cannot be reasonably or adequately compensated in damages in an action

of law, and equitable relief in the form of injunction or other equitable decree may lie.

VIII TERM OF AGREEMENT: Commencement of employment under this Agreement shall begin following the date of this Agreement, subject to approval of the candidate by the Office of the Comptroller of the Currency, and on such later date as Employer and Employee may mutually agree provided however, that this Agreement shall be null and void if such conditions have not commenced by October 1, 1992. This option may be renewed upon ninety (90) day written notice by Employee, indicating exercise of option for additional three (3) years of service, 10/01/95 to 10/01/98, on approval by the Employer's Board of Directors. The Agreement shall terminate on September 30, 1995, unless sooner terminated in accordance with the provisions hereof.

IX TERMINATION OF THE AGREEMENT:

A. Causes of Termination:

(1) Termination by Employee: The Employee may terminate this Agreement, for any reason, upon written notice to the Employer not fewer than 90 days before the date of the intended termination. Employee further agrees, that in the event of resignation or termination of Employee's employment as President and Chief Executive Officer for any reason, Employee will resign from the Employer's Board of Directors on the effective date of such resignation or termination.

(2) Termination by the Employer:

a. For Cause: The Employer may terminate the Agreement, by action of the

Board of Directors, for just cause, including, but not limited to, any willful breach of duty by the Employee in the course of the Employee's employment, or in the case of the Employee's habitual neglect of the Employee's duties, or as determined by the Employer's Board of Directors in good faith, the Employee's continued incapacity to perform the Employee's duties, or if the Employee engages in illegal activity which materially adversely affects Employer's reputation in the community or which evidences the lack of Employee's fitness or ability to perform Employee's duties, or if the Employee is found to be physically or mentally incapable of performing Employee's duties for a period of ninety (90) days or greater. In the event of termination because of the just cause reason of the Employee's continued incapacity to perform, but for no other just cause reason, the Employer shall pay to the Employee a severance amount, in semi-monthly installments, equivalent to one-quarter of the Employee's annual Basic Compensation in effect at the time of the termination for the first year of Agreement, and thereafter in an amount equivalent to one-half of the Employee's annual Basic Compensation in effect at the time of the Employee's termination.

b. Without Cause: The Employer may terminate this Agreement without

cause, upon the Employer's payment to the Employee of a severance amount equivalent to one-quarter of the Employee's annual Basic Compensation at the time of termination for the first year of the Agreement and thereafter equivalent to one-half of the Employee's annual Basic Compensation in effect at the time of the Employee's termination.

(3) Governmental Action: If, pursuant to governmental action, the Employer is ordered to cease business, or the Employer is ordered to remove the Employee from employment, this Agreement shall terminate upon payment to Employee of an amount equivalent to one-half of the Employee's annual Basic Compensation in effect at the time of such governmental action.

(4) Sale, Merger, or Dissolution of Business: In the event of a sale, merger, dissolution of business, or other substantial change in ownership or operation of the Employer's business, the Employer may, at the Employer's option, either terminate this Agreement or assign the Employer's interest in this Agreement to the successor entity. Should this Agreement be terminated, Employee shall be entitled to receive, immediately thereafter, one-quarter of the Employee's annual Basic Compensation for the first year of the Agreement and thereafter six months Basic Compensation at the rate prevailing at termination. Should the Agreement be

assigned, the Employer shall be released from all obligations pursuant to this Agreement.

(5) Expiration of Term: Upon expiration of the term of this Agreement, the Agreement shall terminate unless renewal in accordance with provision of Paragraph VIII, "Term of Agreement".

B. Effect of Termination of Agreement: Upon termination of this Agreement, whether by expiration of the term of the Agreement or by termination pursuant to any provision of the Agreement, or otherwise, all obligations of the Employee and Employer pursuant to this Agreement shall terminate, provided however, the Employee's obligations pursuant to Paragraph IV, "Protection of Business Information" provisions of this Agreement shall continue for an indefinite period, and provided further, that the Employee's obligations pursuant to the Stock Options provisions of this Agreement shall continue for an indefinite period.

X CONSTRUCTION OF THIS AGREEMENT

A. Choice of Law: This Agreement is to be construed pursuant to laws of the State of California.

B. Invalid Agreement Provisions: Should any provision of this Agreement become legally unenforceable, no other provision of this Agreement shall be affected, and this Agreement shall continue as if the Agreement had been executed absent the unenforceable provision.

C. No Other Agreements: This Agreement represents the full agreement between the Employee

and the Employer, and this Agreement supersedes any other agreements, oral or written, that may define the employment relationship between the Employee and the Employer. In executing this Agreement, neither the Employee nor the Employer relies upon any promise, representation, or other inducement that is not expressed in this Agreement. This Agreement may be modified only by written agreement of the Employee and the Employer, and may not be modified by any oral agreement.

D. No Waiver by Failure to Enforce: Failure by either the Employee or the Employer to enforce any provision of this Agreement shall not be construed as a waiver of that provision and shall not prejudice the right of the Employee or the Employer to enforce that provision.

AGREED AND ACCEPTED (EMPLOYEE)

By:
/s/ John J. Mardula, Jr.
John J. Mardula, Jr.

Dated: 9/9/92

AGREED AND ACCEPTED (EMPLOYER)

By:
/s/ Frank J. DeSantis
Frank J. DeSantis
Personnel Committee Chairman
RANCHO DOMINGUEZ BANK, N.A.

Dated: 9/9/92

By:
/s/ Lee M. Anderson
Lee M. Anderson
Chairman of the
Board
RANCHO
DOMINGUEZ
BANK, N.A.

Dated: 9/9/92